



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08267/2016 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 13 July 2020

Decision & Reasons Promulgated
On 27 July 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MUHAMMAD QASIM GULRAIZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER, UKVS SHEFFIELD

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr. A Badar, Counsel, instructed by Ashton Rose Law Solicitors
For the Respondent: Mr. D Clarke, Senior Presenting Officer

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Stedman ('the Judge') sent to the parties on 16 October 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him an EEA Family Permit was refused. The respondent's decision is now of some age, having been issued on 21 June 2016.

2. Upper Tribunal Judge Blum granted the appellant permission to appeal on all grounds.

Remote hearing

3. The hearing before me was a Skype for Business video conference hearing during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.
4. The parties agreed that all relevant documents were before the Tribunal. The video and audio link to Mr. Badar was connected continuously throughout the hearing. Mr. Clarke only enjoyed access to the hearing via an audio link but was content to proceed with the hearing. Both representatives confirmed at the conclusion of the hearing that it had been completed fairly and they were content with the process.
5. The appellant did not attend the hearing. The sponsor, Mrs. Nasir, attended remotely.

Anonymity

6. The Judge did not issue an anonymity direction and no request was made by either party for such direction to be issued.

Background

7. The appellant is a national of Pakistan who was born in 1989 and is now aged 31. He applied for entry clearance as an extended family member under the Immigration (European Economic Area) Regulations 2006 seeking to join his sponsor, his sister-in-law, in this country. His sister-in-law is a Romanian national who resides with her husband, the appellant's brother, in this country.
8. The respondent refused the application for an EEA Family Permit on two grounds: (i) the appellant had failed to provide sufficient evidence that he is the brother of the sponsor's wife; and (ii) he failed to establish that he was wholly or mainly financially dependent on the sponsor. Upon providing DNA evidence the first issue is no longer pursued by the respondent.
9. The appellant's appeal first came before Judge of the First-tier Tribunal Davidson, who dismissed the appeal by means of a decision dated 12 February 2019. The appellant was granted permission to appeal to the Tribunal and the First-tier

Tribunal's decision was set aside, with no findings of fact preserved, consequent to a decision of UTJ Pickup dated 8 May 2019.

Hearing Before the FtT

10. The appeal came before the Judge sitting at Hatton Cross on 30 September 2019. The sponsor attended with her husband and both gave oral evidence.
11. The Judge raised concerns with the witnesses, and counsel for the appellant, as to issues he perceived as arising from the evidence before him. The new issues were not identified within the respondent's decision letter. The Judge concluded that the family circumstances he was presented with were a façade and false. He further concluded as to the purported dependency, at [24]:

24. The refusal of a family permit in this case is justified on the evidence because, as I have analyzed it, I am unable to find that the appellant is dependent on the sponsor. There is wholly insufficient evidence of that. There is some evidence that remittances have been sent by the sponsor to the appellant and I accept that, but these must be viewed in light of my findings, and thus take on a completely different meaning – namely the sponsor simply seeking to enhance the appellant's standard of living. The evidence that the appellant was in any need of an income was lacking. There was no clear reason why he could not support himself and indeed whether he was deriving any income for his own use from his father's land in [addition] to free accommodation.

Grounds of Appeal

12. The appellant initially sought permission to appeal to this Tribunal from the First-tier Tribunal by means of grounds of appeal authored by Mr. Badar, dated 23 October 2019. Judge of the First-tier Tribunal Osborne refused the application by way of a decision dated 24 February 2020. Detailed grounds of appeal were subsequently drafted by the appellant's solicitors, dated 5 March 2020, and filed with this Tribunal. The identification of the two separate grounds of appeal is relevant for reasons addressed below.
13. The grounds advanced by the March 2020 document are discursive in nature and read as submissions rather than as carefully calibrated grounds of challenge. However, the four grounds advanced are interrelated, and primarily submit that the First-tier Tribunal went beyond the scope of the respondent's decision in making adverse findings of fact. Additionally, it is asserted that the Judge applied the wrong standard of proof when considering the issue of dependency.
14. In granting permission to appeal UTJ Blum reasoned, *inter alia*:

'The grounds variously contend that the judge was not entitled to reach his conclusions and that he acted in a procedurally unfair manner. It is arguable that the judge developed his own theory of the case, one that was not advanced by the respondent and one that had not been identified in an earlier decision that

had been overturned by the Upper Tribunal. Although it appears that the judge did make his concerns known to the parties, it is nevertheless arguable that the judge's approach was procedurally unfair, that he went beyond the scope of the case advanced by the respondent, and that he reached conclusions not supported by the evidence.'

Decision on Error of Law

15. Prior to the hearing Mr. Clarke filed and served a copy of a post-hearing note prepared by counsel who represented the respondent at the hearing, Mr. Graham, in relation to the hearing before the Judge. The note is dated 30 September 2019, the day of the hearing. Mr. Clark filed and served a judgment of the Court of Appeal in *Lim v. Entry Clearance Officer, Manila* [2015] EWCA Civ 1383; [2016] Imm. A.R. 421. He further relied upon two decisions of this Tribunal: *JK (Conduct of hearing) Cote d'Ivoire* [2004] UKAIT 00061 and *XS (Kosovo – Adjudicator's conduct – psychiatric report) Serbia and Montenegro* [2005] UKIAT 00093.
16. At the outset of the hearing Mr. Clarke, with his usual candour, conceded on behalf of the respondent that the Judge had materially erred in law by failing to lawfully consider medical evidence filed on behalf of the appellant when reaching the following conclusions, at [10], [24]:
 - '10. ... The appellant is a fit and healthy 30-year old man and there was no reason why, being physically and mentally able, he could not simply get himself a job in Pakistan.
 - ...
 24. ... There was no clear reason why he could not support himself and indeed whether he was deriving any income for his own use from his father's land in [addition] to free income.'
17. Though the respondent's position is that the medical evidence is insubstantial, Mr. Clarke accepted there was a material error in the clear failure by the Judge to expressly consider it when making such findings of fact that subsequently infected the dependency assessment.
18. In making the concession, Mr. Clarke expressly acknowledged para. 10 of the October 2019 grounds of appeal:
 - '10. ... The applicant's statement at paragraph 5 also sets out how he is unwell and is unable to work. It is also submitted that the applicant's medical treatment, which the sponsor has paid for, was part of the applicant's claim and evidence, which clearly does not materialise in the judgment.'
19. This ground of appeal was not advanced by means of the March 2020 grounds and so permission was not granted upon it. As Mr. Clarke observed it is an 'obvious' point. I note that it is reasonable to expect professional representatives to set out

appeal grounds with an appropriate degree of particularity and legibility and a Tribunal should be hesitant in forensically examining the decision to identify grounds beyond those advanced by a professional representative. This is particularly so when a professional representative ‘drops’ a ground of challenge when renewing an appeal on behalf of their client. However, there remains a duty upon the Tribunal to consider points that are obvious: *R v Secretary of State for the Home Department, ex parte Robinson* [1997] 3 WLR 1162. The Tribunal enjoys a power to consider any other point arising from a decision if the interests of justice so require. I observe my indication to the parties at the hearing that it was a point that I had noted in preparing for the hearing. I am satisfied that the failure by the Judge to consider the medical evidence filed in this matter constitutes a material error of law because the conclusion drawn as to the appellant’s fitness to work lacks adequate reasoning and because the Judge proceeded to rely upon the conclusion when making his finding as to dependency.

20. As to the primary contention raised by the grounds of appeal the principle underpinning the appellant’s complaint is fairness, namely that the Judge unfairly made his own assessment as to the relevant family dynamic which was not an issue relied upon by the respondent in either the decision of June 2016, nor before JFtT Davidson earlier in 2019.
21. When laying down a definition that permits the rule of law to stand alone alongside human rights and democracy in the twenty-first century, Lord Bingham opined that all trials and court processes should be fair and this was a broader requirement than the right to a fair trial. At page 90 of his seminal work, ‘The Rule of Law’ (Allen Lane) (2010) first edition, Lord Bingham noted:

‘... it must be recognised that fairness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it. ... fairness is a constantly evolving concept, not frozen at any moment of time ...’
22. The adjudicative procedures provided by the State should be fair. The rule of law would seem to require no less. The application of this sub-rule to ordinary tribunal processes is largely unproblematic and certain core principles have come to be accepted: that a matter should not be finally decided against any party until he has had an adequate opportunity to be heard; that a person should be adequately informed of what is said against them; and that a party should make adequate disclosure of material helpful to the other party or damaging to itself. As to the application of the last point, see the recent Presidential panel decision in *BH (policies/information: SoS’s duties) Iraq* [2020] UKUT 00189 (IAC).
23. The requirement that the First-tier Tribunal deal with cases fairly and justly is enshrined as an overriding objective by rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

24. In *R v. Secretary of State for the Home Department, ex parte Pierson* [1998] AC 559, 591A Lord Steyn observed that the rule of law in its wider sense has procedural and substantive effect. Further, at 591F, Lord Steyn noted that the rule of law enforces minimum standards of fairness, both substantive and procedural.
25. I observe that a party to proceedings is to be given a fair opportunity to meet points that may ultimately be held against them, particularly where their honesty is in question. Fair proceedings require sufficient notice of an issue to be given to a party or a witness.
26. During the course of the hearing, and in his decision, the Judge was concerned by an issue that did not form a ground of refusal in the respondent's decision letter of 2016 and had not formed part of the respondent's case before JFt Davidson earlier in 2019. The Judge raised his concerns with the sponsor, as confirmed at [13] of the decision, and with the appellant's brother, at [14]. The Judge proceeded to give the sponsor and the appellant's counsel an 'opportunity to either take instructions or even alert me to any professional concerns that [counsel] may have had', at [14].
27. Having been informed by counsel that he did not have any professional concerns, the Judge details at [14]:
- 14 ... I was satisfied that the sponsor and the appellant's brother were given every opportunity to comment on the view I had taken on the evidence and that the hearing was fair to them ...'
28. In placing the sponsor and her husband on notice as to the issue on his mind, which was not relied upon by the respondent in the decision letter, the Judge is presumed to have had in mind the common law rule of evidence identified by the House of Lords in *Browne v. Dunn* (1893) 6 R. 67, namely that it is only fair to witnesses that if their evidence is to be disbelieved, they must be given a fair opportunity to deal with the allegation. As observed by Lord Herschell L.C., at [70]-[71]:

'I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'

29. Newey LJ confirmed in *Howlett v. Davies* [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948, at [39]:

39. It is perhaps worth adding two comments. First, where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide. Secondly, the fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying. That must, in fact, be a common occurrence.

30. The purpose of the rule is well-grounded; witnesses should be given an opportunity to respond to competing versions of events.

31. The duty is generally one that is placed upon an advocate representing a party as it requires a matter to be put directly to a witness if a party is going to later adduce evidence to impeach the witness' credibility or present contradictory evidence. However, as observed by the Court of Appeal in *Howlett v. Davies*, at [31], judges are often required to characterise witnesses as having been deliberately untruthful even where there has been no prior assertion of dishonesty. The question arises as to whether a judge can intervene and raise concerns as to credibility during the course of a hearing. In *JK (Conduct of Hearing)* Ouseley J, sitting as the President of the Immigration Appeal Tribunal, confirmed the position to be adopted by the judiciary, at [43]:

43. ... An Adjudicator ought not to interrupt examination-in-chief or cross-examination except in the circumstances to which we have referred or for other reasons associated with the general conduct of the case and the court room. If there are inconsistencies between documents and oral evidence or between answers which have been given already, it is nearly always best to wait until after cross-examination and re-examination to see what matters are put. However, it is wholly legitimate for the Adjudicator to ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator, whether or not they are raised by the other party. What is important, whether or not they are raised by the other party is that the Adjudicator should not develop a different case from that being present by the other party or pursue his or her own theory of the case. [Emphasis added]

32. Consequently, whilst a judge may indicate to the parties any concerns held as to a witness' credibility, and ask his or her own questions in the manner identified by the Tribunal in *JK*, it is for the parties to put forward their own case. For a judge to impose his or own theory of a case upon the parties and to determine accordingly would be procedurally unfair.

33. Mr. Clarke informed me as to the respondent's position which is that the Judge did not pursue his own theory of the case. Rather, he raised concerns which were then adopted by the respondent at the hearing. The difficulty for this Tribunal is that the decision is unclear as to who led the questioning of the witnesses on the issue. On behalf of the respondent Mr. Graham's post-hearing note is sparse on detail. Further whilst complaint is made as to the approach adopted by the Judge, Mr. Badar did not file a witness statement detailing events at the hearing before the First-tier Tribunal and therefore could not give evidence to me as a witness because of his role as an advocate before this Tribunal. The failings of the parties to provide clear witness evidence as to the circumstances in which the sponsor and the appellant's brother were cross-examined, including who asked them questions relating to the new issues, is stark.
34. Proceeding on the basis that the respondent's position before this Tribunal is correct, and that Mr. Graham expressly adopted the new issues as part of the respondent's case before the Judge, the question arises as to who was given notice in this matter. In the hearing room the new issues were addressed to the sponsor and the appellant's brother-in-law. However, the appellant was over 3,500 miles and several time zones away in Pakistan. Whilst the appellant had previously filed written evidence with the First-tier Tribunal it did not address the concerns raised by the Judge, and adopted by the respondent, at the hearing. It is appropriate to observe that the appellant cannot be criticised for failing to address the new issues raised by the Judge when he prepared his case. He was entitled to rely upon the issues relied upon by the respondent of which he had notice.
35. It is often the case that in entry clearance appeals a sponsor at the hearing can provide evidential clarification to issues arising. However, in this matter the appellant was provided no opportunity to address significant credibility concerns raised for the first time at the hearing. Unfortunately, counsel for the appellant was content for the hearing to proceed without adequate instructions from his client on the new issues and did not seek an adjournment to permit his client the opportunity to address them. This approach was adopted despite the Judge indicating that counsel could have time to take instructions, at [14]. Such failure may possibly have encouraged the Judge to proceed with the hearing and to make significant, adverse credibility findings without permitting the appellant the opportunity to address them. If an adjournment application had been made on behalf of the appellant, seeking to protect his position, the Judge would have been required to consider the fairness of proceeding in the absence of the appellant's direct evidence on the new issues. As explained by the Upper Tribunal in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC), if a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects and these include denying the party concerned a fair hearing. In all of the circumstances, the decision by the Judge to proceed with the hearing without the appellant being able to provide written evidence addressing the new issues of concern raised at the hearing, which were significant in nature, was a breach of procedural fairness and constituted a material error of law.

36. I informed the representatives at the hearing that a further 'Robinson obvious' point arose in this matter. The Judge aired suspicions concerning the personal circumstances of the sponsor's children at [18]. Having aired them, he curtly observed that he drew no 'specific conclusion' upon them. The suspicions, if correct, would be significant and highly adverse to the children. The Judge then proceeded to make a finding at [23] of his decision as to the arrangement presented by the appellant, his brother and the sponsor being a 'facade and false', and to make further observations closely aligned to the suspicions raised at [18]. I further observe the Judge acknowledges at [13] that during the course of the hearing when giving notice to the sponsor and the appellant's brother as to the new issues, he identified his suspicions as being 'glaringly obvious' and in doing so expressly made reference to the suspicions he subsequently addressed at [18]. In the circumstances it is appropriate to read the views expressed by the Judge at [13] and [18] into his finding of fact at [23]. The concerns raised are of grave significance to the children, who are now subject to the judicial observations made as well as, importantly, to the finding made in the last three lines of [23].
37. I have significant concerns as to why the hearing was permitted to proceed, rather than adjourned, in light of the Judge's expressed concerns to the representatives in relation to the children, who are not parties to these proceedings and whose parents are witnesses and not parties, in circumstances where the children were not permitted the opportunity to seek and secure evidence that may prove capable of allaying judicial concerns that go to the heart of the appellant's appeal. It is striking that neither counsel appearing before the Judge believed it appropriate to identify that the Tribunal, as well as the respondent, are subject to a duty to act in the best interests of the children under section 55 of the Borders, Citizenship and Asylum Act 2009. I am satisfied that the decision of the Judge to proceed onwards to consider the circumstances of the children, and make far-reaching personal findings of fact, without permitting an opportunity for the children to seek to protect their position by means of filing appropriate evidence, was a flagrant failure to act in their best interests. Whether or not the Judge's suspicions as to particular facts are accurate, the Tribunal is satisfied that both the Judge and counsel lost sight of the basic requirement to act fairly towards the children in this matter and to act in their best interests. Such failure is a material error of law.

Remaking the Decision

38. Both representatives confirmed that this matter should properly be remitted to the First-tier Tribunal.
39. I observe that this appeal commenced in 2016 and has so far been considered by the First-tier Tribunal and this Tribunal on four separate occasions. There is much to suggest that it should remain in this Tribunal. However, I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. I am satisfied that the

effect of the material errors identified above has been to deprive the appellant of a fair hearing before the First-tier Tribunal and so it would be just to remit the matter to the First-tier Tribunal: paragraph 7.2(a) of the Joint Practice Statement.

40. On behalf of the appellant Mr. Badar conceded that the appellant now has personal notice of the new issues, which Mr. Clarke confirmed the respondent continues to rely upon, and so will be expected to address them at the next hearing without the requirement of a new decision being issued.
41. The parties addressed me upon whether the evidence of the sponsor and the appellant's brother as presented orally to the First-tier Tribunal could be relied upon by the respondent at the next hearing. As the appellant's position as to the new issues raised by the Judge is presently opaque, it would not be appropriate for the Tribunal to make a determinative finding on this issue, save as to observe that both the sponsor and the appellant's brother had notice of the nature and substance of the judicial concerns when giving oral evidence. If the appellant proceeds with his appeal, it may well be that when listing this matter the First-tier Tribunal can expect additional time to be required to consider this, and potentially other, preliminary issues. The representatives before me indicated that up to one extra hour may be required for preliminary argument.

Direction

42. Whilst directions should properly be a matter for the First-tier Tribunal, in order to permit time for the sponsor's children to secure further evidence the representatives were in agreement that the hearing of this matter should not take place until 16 November 2020 at the earliest, a period of four months from the hearing of this appeal before the Tribunal.
43. I therefore direct:
 - (i) The hearing of this appeal by the First-tier Tribunal sitting at Hatton Cross, should take place on the first available date on or after 16 November 2020.
44. It is appropriate that the First-tier Tribunal, and not this Tribunal, consider as to whether this matter should be conducted remotely, by means of a hybrid hearing or at a face-to-face hearing.

Notice of Decision

45. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 16 October 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

46. The matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judges of the First-tier Tribunal Davidson and Stedman.
47. No findings of fact are preserved.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 15 July 2020