



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/05419/2019

THE IMMIGRATION ACTS

Heard at Field House
On 26 February 2020

Decision & Reasons Promulgated
On 20 April 2020

Before

Upper Tribunal Judge Gill

Between

Mr MD Imamul Hasan
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Mortuza of Reliance Solicitors.
For the respondent: Ms A Everett, Senior Presenting Officer.

Decision and Directions

1. This is an appeal against a decision of Judge of the First-tier Tribunal Freer who, in a determination promulgated 27 August 2019 following a hearing on 14 August 2019 dismissed the appeal of the appellant, a national of Bangladesh born on 15 April 1987, against a decision of the respondent of 8 March 2019 to refuse his application of 5 October 2018 for leave to remain in the United Kingdom under Article 8 (private life) of the ECHR.
2. An important factual issue before the judge was whether the appellant had used a proxy test taker to take an English language test at Synergy Business College of London on 18 September 2012, as the respondent contended in the decision letter, and in respect of which an English language test certificate was issued and used by

the appellant to make his application of 23 October 2012 for leave to remain as a Tier 4 student, such leave being granted on 18 April 2013.

Application for adjournment

3. At 15:28 hours on the day before the hearing date, the Upper Tribunal received an email requesting that the hearing be adjourned on the ground that Counsel (Mr P. Lewis) had been accidentally double-booked. The email stated that Counsel intended to attend his other hearing which was at York House at Hatton Cross due to the appellant in that case instructing him by direct access, being vulnerable and an expert witness attending.
4. The application was refused by Ms L. Watton, Lawyer of the Upper Tribunal (IAC), pursuant to delegated judicial powers, by email at about 16:57 hours.
5. On the hearing day, Mr A. Mortuza of Reliance Solicitors attended. He informed me that he would be requesting an adjournment and that Mr Lewis was at his hearing at Taylor House, which surprised me as the Upper Tribunal had been informed in the email of the previous day that the hearing was to take place at York House.
6. Before I heard Mr Mortuza's adjournment request, I asked Ms Everett to let me know whether it would be necessary for me to hear submissions from both parties before deciding whether the judge had materially erred in law and whether the appeal should be remitted. Ms Everett indicated to me that I did not need to hear submissions and that, in her view, it would be necessary to set aside the decision of the judge and remit the appeal to the First-tier Tribunal ("FtT").
7. Without hearing any submissions on any substantive issues, I asked Mr Mortuza to pass a message to Mr Lewis and inform him that Ms Everett had agreed that the decision should be set aside and the appeal remitted to the FtT. Mr Mortuza left the hearing room in order to contact Mr Lewis.
8. Upon his return, Mr Mortuza informed me that Mr Lewis had stated that he was 'happy' with the decision of the judge being set aside and the appeal being remitted. He expressed his thanks to the Tribunal.
9. I took this to mean that there would be no prejudice to the appellant if I proceeded to hear from Ms Everett as to the reasons for setting aside the decision of the judge. Ms Everett informed me that she agreed that grounds 1, 2, 4, 5 and 6 were established and that these errors were material.
10. It was therefore unnecessary for me to hear any application by Mr Mortuza for an adjournment.

Assessment

11. The judge found that the respondent had discharged the burden of proof upon her to show that the appellant had used a proxy test taker for the English language test at Synergy Business College of London on 18 September 2012. He gave his reasons at paras 40-56. I will deal with such of these reasons as I consider necessary.

12. I am satisfied that grounds 1, 2, 4, 5 and 6 are established. Dealing with these in a slightly different order, my reasons are as follows:

i) Ground 1: The judge misapprehended the evidence when he said, at para 46, as follows:

"I consider that a near fatal blow was struck to the case by the appellant scoring of top marks, 200, very improbable from a candidate who certainly fell short in his UK degree by obtaining a 3rd class Honours pass, ..."

In fact, as stated in ground 1, the appellant did not score full marks overall. He scored 170 out of 200 in his speaking test. The score of 200 out of 200 related to his writing test, on which, as contended in ground 1, no cheating had been alleged.

This error was plainly material, as the judge described it as a "*near fatal blow*" to the appellant's case.

ii) Ground 4: The judge's reasoning at para 44, as quoted below, is either perverse or entirely unsupported by evidence. At para 44, he said as follows:

"There is a point in the evidence I need to treat very carefully. The appellant has made a self-serving declaration that he wants to be a lawyer, with the implication or pressure that I should believe he is innocent. The appellant is not a lawyer today. He has never achieved that in his home country. He took a business and management course when he could have been taking a law course. I suspect that I am being told a doubtful story to get me on side, because I am a lawyer. It really is not confirmed yet by cogent evidence that the vocations for this appellant is lawyer in any country. He did not complete the only law course he attempted and then changed his subject. This sounds like somebody who gave up on becoming a lawyer after trying it out."

(My emphasis)

The grounds contend (which Ms Everett did not dispute) that the appellant had provided evidence that he had applied for a secured place to study law at a college accredited by the University of London; that the college ceased providing this qualification whilst the appellant was attending the course and was closed shortly thereafter with the result that the appellant lost all of the fees that he had paid; and that he had provided confirmation from a university that he had secured an unconditional offer to study the Graduate Diploma in Law (GLD) course (a conversion course) in September 2020.

It follows that the judge's reasoning at para 44 was not only unsupported by the evidence, it was contrary to the evidence. In the alternative, he misapprehended the evidence.

It is evident from the words I have underlined in relation to para 44 above that the judge played weight on this issue.

iii) Ground 2: The judge erred by relying upon the appellant's demeanour in reaching his adverse credibility assessment, when he said, at para 45, as follows:

"I was struck by his nervousness. Whilst not proof of guilt or innocence, many lawyers find a level of self-confidence and self-expression is part of their basic tool kit from early on. So, I say that I am sceptical for several reasons about his claimed interest in a legal career."

Although the judge said that the appellant's demeanour was not proof of guilt or innocence, it is clear from the second sentence quoted above that he did nevertheless take it into account in making his adverse credibility assessment, contrary to the guidance in R (SS) (Sri Lanka) v SSHD [2018] EWCA Civ 1391 where the Court of Appeal said, in effect (paras 36-37), that it was becoming recognised that drawing conclusions about a witness's credibility from their demeanour was unreliable and often dangerous; that that was particularly so where the witness was of a different nationality from the judge and was speaking English as a foreign language or was giving evidence through an interpreter; that while it was impossible, and perhaps undesirable, to ignore demeanour altogether, to attach any significant weight to impressions formed from demeanour in assessing credibility risked judgments that had no rational basis or which reflected conscious or unconscious biases and prejudices; and that the only reliable way to assess whether oral evidence was truthful was to focus on its content and determine whether it was consistent with other evidence.

The fact that the judge expressed himself as he did in the first sentence quoted above shows that he did indeed attach significant weight to the impression he formed from the appellant's demeanour. In doing so, he erred in law.

- iv) Ground 5: The judge erred in stating, at para 48, as follows:

"He could have afforded to pay a proxy. He was working for pay and he was watching his money".

However, the mere fact that a person can afford to pay a proxy does not make him more likely to have done so, just as the mere fact that a person earns a low wage does not make him more likely to steal. The judge therefore took into account an irrelevant consideration.

- v) Ground 6: The judge erred at para 55 when he said:

"The degree in Bangladesh or the score of 6 at the British Council in 2008 have little bearing on what happened in 2012. It is nonsensical and inconsistent to take a business degree at Northampton over a number of years, if you want to be a lawyer. I suggest he simply made up the desire to be a lawyer. The last time I heard such an argument, the person had already qualified as a lawyer in two jurisdictions, which is quite a contrast with the facts before me."

The judge plainly erred in assessing this aspect of the appellant's credibility by comparing his case with that of another case to which he (the appellant) was not a party and of which he was not aware.

13. Ground 1 was plainly material to the judge's finding that the appellant cannot meet the requirements under the Immigration Rules, if only because the judge expressed the issue in question as a "*near-fatal blow*" to the appellant's case. In any event, taking grounds 1, 2, 4, 5 and 6 cumulatively, the case for setting aside the judge's

reasoning and decision on the dishonesty in its entirety is unanswerable because there is insufficient reasoning in the remainder of the judge's assessment from paras 40-57 that, on any legitimate view, could sustain his finding that the respondent had established that the appellant had used a proxy test taker for the English language test at Synergy Business College of London on 18 September 2012.

14. Given that the judge only had a human rights ground of appeal, there being no right to appeal against a decision under the Immigration Rules, the judge's finding that the appellant could not meet the requirements of the Immigration Rules inevitably affected his decision to dismiss the Article 8 claim.
15. In any event, the judge's decision on the appellant's Article 8 claim stands to be set aside for the following reasons:
16. The judge gave his reasons for finding that the decision was proportionate at paras 63-64, which read:
 - "63. The appellant can speak a level of English and can fund himself but these are neutral points. He has been conspicuously unsuccessful in most of his study efforts. One of his degrees was a 3rd class degree. Many courses never reached fruition and the money so lost could have been a motive to cheat. There really is no good balancing exercise that approaches the weight given on the respondent's side in the balancing exercise under **Razgar** of the five stages ending in a proportionality test. However, that is a fallback position, since I do not consider there was any breach of family or private life rights. Even if I had cleared the appellant of dishonesty, that is a huge problem for him with this appeal being limited to human rights.
 64. For these reasons, the refusal is both lawful and proportionate. The upholding of law and order requires cheating of immigration controls to be deterred...."
17. Although the phrase "*Even if I had cleared the appellant of dishonesty...*" means that the judge was saying that the appellant's appeal on human rights grounds would have been dismissed even if he had not found against the appellant on the question of dishonesty, that simply cannot be the case given the words underlined above in relation to para 64 which show, in my view, that his decision on the allegation of dishonesty affected his consideration of the Article 8 claim outside the Immigration Rules.
18. Accordingly, it is necessary to set aside the whole of the judge's decision, save that his summary of the evidence at paras 21-30 stands as a record of the evidence that was given before him.
19. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
 - "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

20. In my judgment this case falls within para 7.2 (b). There is a lot of evidence in this case. It is necessary for the decision on the appellant's appeal to be re-made on the merits on all issues. In all of the circumstances, it would be simply unfair not to remit the appeal to the FtT.
21. Since Mr Lewis did not attend the hearing, it was not possible for me to give any directions or conduct any case management. In the circumstances, the most I could do was to take the steps explained at paras 6-9 above and avoid an unnecessary adjournment.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appeal is set aside. This case is remitted to the First-tier Tribunal for the decision on the appellant's appeal to be re-made on the merits on all issues by a judge other than Judge of the First-tier Tribunal Freer.

Directions to the parties

1. The Appellant shall notify the Tribunal within five days of the date on which these Directions are despatched the following:
 - (a) if an interpreter is required at the hearing, the language in which an interpreter is required;
 - (b) the number of witnesses who will give evidence.
2. Any evidence the Appellant seeks to rely on must be served within 21 days of the date on which this “Decision and Directions” is sent to the parties. The Appellant's bundle must include:
 - a. Witness statements of the evidence to be called at the hearing.
 - b. A paginated and indexed bundle of all documents to be relied on at the hearing. Essential passages must be identified in a schedule, or highlighted.
 - c. A skeleton argument, identifying all relevant issues and citing relevant authorities.
 - d. A chronology of events

Signed
Upper Tribunal Judge Gill

Date: 28 February 2020