



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/10292/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 26th July 2021

On the 12 August 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SRIMAL SUMEDHA RATHNAYAKA RATHNAYAKA MUDIYANSELAGE

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Mr A Tan, Senior Presenting Officer

For the Respondent: Ms S Iqbal of Counsel, instructed by Shanthi & Co Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. To avoid confusion, for the purpose this decision I have referred below to the parties as they were before the First-tier Tribunal.
2. The appellant is a national of Sri Lanka with date of birth given as 3.7.86.
3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 31.10.19 (Judge Lucas), allowing the appellant's human rights appeal against the decision of the Secretary of State, dated 29.5.19, to refuse his application made on 9.2.18 for leave to remain on long residence grounds, pursuant to the Immigration Rules.
4. The grounds of application first assert a procedural irregularity in refusing to allow the presenting officer adequate time to consider the appellant's late-served bundle, which exceeded 600 pages, creating a severe disadvantage and prevented the presenting officer from adequately putting her case. It is further asserted that the judge failed to adequately address the burden of proof in line with SM and SM & Qadir [2016] EWCA Civ 1167, which makes clear that the 'generic evidence' combined with evidence specific to an appellant discharged the evidential burden of proof that a TOEIC certificate had been obtained by dishonesty and called for an innocent explanation by the appellant. It is also argued that the judge overlooked aspects of the evidence, including the report of Dr French to the effect that there is a less than 2% chance of a false positive. Other grounds refer to the judge's reliance on the appellant's English ability despite the Upper Tribunal finding in MA Nigeria [2016] UKUT 450 that there is a range of reasons why persons proficient in English may engage in TOEIC fraud.
5. Permission to appeal was granted by the First-tier Tribunal on 24.2.20, on the basis that it was arguable that the First-tier Tribunal erred in failing to grant an adjournment request made at the hearing by the presenting officer on the ground that further evidence had been submitted by the appellant on the day of the hearing. The judge granting permission observed that the decision is silent as to any adjournment application, "as such it is difficult to make an informed decision as to whether or not the judge's decision was sound in respect of the adjournment request. This matter must be looked into further. Accordingly, there is an arguable error of law."
6. The Upper Tribunal has received Ms Iqbal's submission in response to directions issued by the Upper Tribunal on 31.3.20, together with the witness statement of counsel at the First-tier Tribunal hearing, Mr Solomon, dated 1.4.20, which attaches the back sheet of his brief and his notes. The Upper Tribunal has also

received the Presenting Officer's Minute of the hearing, dated 15.10.19. I was also referred to Mr Solomon's skeleton argument put before the First-tier Tribunal and dated 15.10.19. I was told that Mr Solomon was available to give oral evidence if necessary. However, Mr Tan did not challenge the account in the witness statement, so oral evidence as to what happened at the hearing was not necessary.

7. I have also looked at the judge's record of proceedings, but these do not address the issue raised by the presenting officer and the request for time to consider the material, or an adjournment.
8. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
9. There are a number of difficulties with this decision.
10. First, the judge referred to the wrong decision of the respondent, referring to the appeal being against the decision of 19.6.18. In fact, that decision, which rejected the appellant's further submissions under paragraph 353, did not grant the appellant a right of appeal. In response, he launched judicial review proceedings, as a result of which the respondent agreed to reconsider the decision as reflected in the consent order of 22.3.19. In that consent order, the respondent agreed that if the appellant succeeded in any appeal on the basis that he did not commit a TOEIC fraud, "then in the absence of some new factor justifying a different course, the respondent will rescind his decision of the 3 September 2014 and treat the claimant as being an in time applicant since 03 September 2014 (and any earlier period as may be established) as if he had 3C leave..." He would also be given a reasonably opportunity being not less than 60 days to submit an application for further leave.
11. The respondent remade her decision on 20.5.19, again refusing the long residence application, against which the appellant appealed to the First-tier Tribunal asserting breach of human rights. That the judge failed to appreciate the history and referenced the wrong decision being appealed did not bode well when considering the other aspects of the grounds.
12. The Presenting Officer's Minute records that the judge was asked for time to go through the late-served appellant's bundle, or for a short adjournment. The minute notes that whilst the judge accepted that such late service of such a large bundle was not acceptable, the judge "wanted to proceed and was happy for me not to ask anything and let him do the work." The presenting officer made clear that she was not happy with this and indicated she would be present and would ask questions. Mr Solomon's recollection was that at the outset of the hearing there had been a general discussion regarding the late service "but no clear

formal application to adjourn was made by the presenting officer,” and that if this had been made and refused, he would have noted it.

13. I am satisfied that no formal adjournment application was made, but accept that there was a discussion about the late service and the difficulties in which the presenting officer was placed. Unfortunately, none of this was noted in the record of proceedings and is not referred to at all in the decision of the First-tier Tribunal. Mr Tan complains that the presenting officer was denied the opportunity of preparing properly to address both the ETS and the article 8 aspect of the appeal. It is difficult to say with hindsight whether the judge’s rather robust approach to the complaint of the presenting officer and his refusal of at least a short adjournment to prepare the case (or at least time to canvass with the appellant’s representative what of the huge appellant’s bundle was relevant), was material to the outcome of the appeal. However, I am satisfied that the insistence in going on immediately was procedurally unfair and put the presenting officer in difficulties in advancing her case properly, through no fault of the respondent. Even if I am wrong on that assessment, I am satisfied that the other errors identified below require this decision to be set aside.
14. I am satisfied that the complaint that the judge failed to properly address the legal and evidential burdens of proof consistent with SM and SM & Qadir [2016] EWCA Civ 1167 is made out. Whilst the judge repeatedly pointed out that the legal burden was on the respondent, he made no reference to the generic evidence with that relating to the appellant being sufficient to discharge the evidential burden. At [36] the judge appears to criticise the respondent for not obtaining the voice recording, without recognition that even in the absence of the voice recording the evidence adduced was sufficient to discharge the evidential burden. The judge did not consider whether the evidential burden had been satisfied or properly consider whether there was an innocent explanation. I am satisfied that this approach was in error of law.
15. I am also satisfied that the judge either misunderstood or overlooked the evidence in support of the respondent’s case. Whilst at [8] the judge referred to the supplementary bundle as the generic evidence “that is well know(n) to the Tribunal,” and the Annex A1 relating to the appellant, there was no reference to the other evidence, including that of Professor French as to the low likelihood of a false positive. Further, there was no reference to Annex B which set out the results from the particular college on the very date of the appellant’s test, showing that 91% of tests had been invalidated, with 9% questioned, and none were allowed to proceed unquestioned. This was highly material to the assessment of the evidence and the appellant’s credibility. At [10] the judge referring to the overall results for the South Quay College between 2012 and 2014 and incorrectly stated that there was “no other specific evidence in relation to this appellant”. It follows that the findings were made without adequate

consideration of the evidence as a whole and, therefore, that those findings are flawed and cannot stand.

16. There are other concerns highlighted in the grounds, including the judge's apparent reliance on the fact that the appellant speaks English and that he had a parking ticket for the vicinity of the college. As highlighted above, those who speak English may have a range of reasons for using a proxy. Further that the appellant attended the centre does not demonstrate that he took the test. The evidence is that many dishonest persons attended test centres but allowed proxies to take the test in their place. No adequate and balanced assessment of this evidence was made.
17. Mr Tan also points out that the judge stopped consideration of the case on the assessment of the ETS English language point, when there were other reasons cited in the refusal decision for rejecting the application, including the Knowledge of Life in the United Kingdom test requirement. Neither did the judge make any adequate article 8 ECHR assessment. Ms Iqbal argued that given the terms of the consent order, all the judge had to do was determine whether there had been dishonesty in the obtaining of the ETS certificate. However, as is clear from what is set out above, the judge appeared unaware of the history of the appeal or even which decision was under appeal. Nevertheless, if the appellant succeeded so that the 2014 decision was incorrect, it would inevitably follow that the appeal would be allowed on human rights grounds. In the premises, I find no error of law in failing to further address the article 8 ECHR aspect.
18. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal that it must be set aside.
19. 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. The errors of the First-tier Tribunal Judge vitiate both the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed

The decision of the First-tier Tribunal is set aside with no findings preserved

The remaking of the decision in the appeal is remitted to the First-tier Tribunal

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 26 July 2021