



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004366
First-tier Tribunal No:
HU/05576/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ABDUL QADIR MOHAMMED
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. P. Lewis, Counsel, instructed by Liberty Legal Solicitors Ltd
For the Respondent: Ms. A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 23 November 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Brannan (the "Judge"), dated 17 August 2023, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse his human rights claim. The Appellant is a national of Bangladesh who applied for leave to remain on private life grounds.
2. Permission to appeal was granted by First-tier Tribunal Judge Dainty in a decision dated 19 September 2023 as follows:

"2. The grounds raise procedural unfairness on the basis that findings have been made that were not mentioned at the hearing and not put to the Appellant (in particular relating to photographs and documents from Stanfords College). It is asserted that the judge strayed beyond their remit by for example analysing signatures. Further it is asserted that the judge has carried out his own research/relied on his own knowledge beyond the scope of

“judicial notice.” It is also averred that the judge erred in having extensive reference to the prior/set aside determination of Judge Hoffman. The Appellant further asserts that the judge has effectively placed the burden of proof on the Appellant which is at odds with DK & RK.

3. It is asserted that the judge overlooked the importance or relevance of a number of items of evidence.

4. The matter is in my view finely balanced and the judge has given detailed reasons for his findings and for relying on items of evidence that weren't specially considered in the hearing or put to the Appellant. One also must bear in mind the practical reality of the way hearings are presented and the relative shortness of a hearing compared to the number of documents and issues. Nevertheless it is arguable here that the combined effect of having regard to his own knowledge of Microsoft excel as well as there being not just one document or issue relied on by the judge that wasn't put to the Appellant but several amounts overall to a hearing that was procedurally unfair. It is arguable that this is not rescued by the overarching cheating allegation being put to him. Arguably it is even more important in a case where fraud is alleged for there to only be adverse findings in relation to documents that have actually been put (even if that involves written responses after the hearing where necessary).”

The Hearing

3. At the outset of the hearing Ms. Ahmed submitted that she would not be opposing the Appellant's appeal. Having considered the decision and grounds, and the cumulative effect of the errors of law pleaded, she agreed that the decision was rendered unsafe. She agreed with Mr. Lewis' proposal that the appeal be remitted to the First-tier Tribunal to be reheard de novo, given the nature of the error of law.
4. In agreement with Ms. Ahmed's concession I stated that the decision involved the making of material errors of law. I set the decision aside.

Error of Law

5. I find, as set out in the grant of permission, that the grounds are made out.
6. Ground 1 asserts that there has been significant procedural unfairness as the Judge “raised issues which were not raised at the hearing, and found against the Appellant on matters not put to him or challenged by the Respondent”. The grounds assert that this was contrary to the position set out in Browne v. Dunn (1893) 6 R. 67, H.L and MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC). The grounds refer to [19] of the decision where the Judge states:

“I have, however, identified issues with the Appellant's own documentary evidence, some of which were not discussed in full at the hearing. I do not consider this to be unfair in the circumstances for the following reasons.”

7. The grounds then set out various documents which the Judge states were not drawn to the Appellant's attention but on which he makes adverse findings, for example the Judge refers to a photograph of the Appellant appearing to show him to be “significantly older” [57]. The grounds also refer to [64] onwards where the Judge raises a number of issues relating to documents from Stanfords College, which he accepts at [72] were not raised at the hearing. It was submitted that

this evidence was not challenged by the Respondent, and the Appellant had been denied the opportunity to deal with these matters. Further reference is made to [76] and [80] where the Judge “purports to give expert evidence about signatures, and says that these raise doubts about authenticity, despite the Respondent not raising those doubts in the refusal or review and there being no document verification reports”.

8. Ground 2 asserts a further element of procedural unfairness as the Judge has appeared to have “conducted his own research/imposed his own knowledge of matters outside the scope of “judicial notice””, for example in relation to his knowledge of excel spreadsheets.
9. I find that the Judge has erred as set out in these grounds by making adverse findings on matters which were not in issue before him, without giving the Appellant an opportunity to respond. This is particularly material given that the core of the appeal is whether or not the Appellant had used deception in relation to his ETS test.
10. Ground 3 asserts that the Judge appears to have had “extensive regard” to the decision of Judge Hoffman which had been set aside, apart from one preserved aspect. The grounds refer to [22] of the decision where the Judge states “Furthermore, the Appellant has then adduced evidence after the hearing before Judge Hoffman to deal with criticisms of the evidence relied on before Judge Hoffman”. Further at [32] and [52] the Judge refers to matters considered in Judge Hoffman’s decision.
11. I find that this ground is also made out. The Judge should not have had any regard to the decision which had been set aside, apart from the preserved matter. I find that this has affected his approach to the evidence, and is a material error of law.
12. Ground 4 refers to the Judge’s consideration of DK & RK (ETS: SSHD evidence: proof) India [2022] UKUT 00112 (IAC). The grounds submit that this case “confirms that there is no burden of proof on the Appellant” but that at [25] of the decision the Judge has reversed the burden on to the Appellant.

“The Appellant’s case is not simply that he did not cheat, but also that he had no reason to cheat and has good character. These are aspects of his case which the Tribunal must assess. The Respondent has not proposed an alternative theory on these. But he who asserts must prove.”
13. It is submitted that the Judge then required the Appellant to prove certain elements of his case throughout the rest of the decision. I find that this is made out, and that the Judge has put a burden onto the Appellant in respect of matters where the burden lay with the Respondent.
14. Ground 5 alleges that the Judge erred in overlooking the importance and/or relevance of evidence, listing eight areas where this has occurred. This includes evidence relating to the issue of whether the Appellant practised deception.
15. Taking the grounds as a whole, I find that the Judge erred in his approach to the evidence before him. I find that he made adverse findings on matters which had not been put to the Appellant, and about which the Respondent had not taken

any issue. Given the nature of the appeal before him, I find that these errors were material.

16. I have taken into account the case of Begum [2023] UKUT 46 (IAC) when considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”

17. With reference to the exceptions in 7(2)(a) and 7(2)(b), there are no findings that can be preserved. While I appreciate that this appeal has been ongoing for some time, given the procedural nature of the errors, and the extent of the fact-finding necessary, it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

18. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.
19. The appeal is remitted to the First-tier Tribunal to be reheard afresh with no findings preserved.
20. The appeal is not to be listed before Judge Brannan or Judge Hoffman.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 November 2023