



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002379

First-tier Tribunal Nos: HU/58493/2022
LH/01292/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of January 2025

Before

UPPER TRIBUNAL JUDGE McWILLIAM
UPPER TRIBUNAL LOUGHRAN

Between

KHAWAJA AMANULLAH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Fazli, Counsel, instructed by NWL Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 28 November 2024

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. His date of birth is 9 March 1975.
2. On 26 June 2024 Upper Tribunal Judge Macleman granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Khawar) to dismiss his appeal against the decision of the Secretary of State for the Home Department ("the SSHD") on 31 October 2022 to refuse his application for leave to remain on the basis of continuous residence in the UK.
3. The Appellant's evidence is that he came to the UK on 12 April 2002 and has remained continuously since then. It is agreed by the parties that he made a claim for asylum in 2002. His application was refused by the SSHD. The Appellant appealed and his appeal was dismissed in 2002 by the First-tier Tribunal.

The appeal to the First tier Tribunal

4. In respect of the decision under appeal, the SSHD accepted that the Appellant had been in the UK in 2002 and that he had been in the UK since 2009. The SSHD did not accept that the Appellant had been in the UK continuously from 2003-2009.
5. Judge Khawar (the judge) did not find that the Appellant was credible. He did not accept that that the Appellant had been in the UK between 2002-2009. The Appellant's evidence about this period was that he was financially supported by and resided with his brother, Mr Omer. He was not allowed to be named on utility bills
6. The judge attached no weight to Mr Omer's witness statement. He said that because Mr Omer did not attend the appeal hearing his evidence is "untried" and "untested". The judge did not accept the Appellant's explanation for why his brother was not able to attend the hearing. He said that he was employed by Network Rail and was unable to take time from work because the month of August is a busy period. The judge did not accept that the explanation was reasonably likely to be true in the absence of documentary evidence from Mr Omer's employer. The judge said that there was no application by the Appellant to adjourn the appeal to an alternative date to ensure the attendance of his brother.
7. The judge found the evidence of the Appellant and that of Mr Omer was discrepant about addresses. The Appellant submitted tenancy agreements to support where he was residing during the relevant period. To explain the provenance of these, the Appellant's evidence was that he had contacted the landlord, Mr Choudury, who provided him with the documents. The judge queried why the landlord, in a letter of 28 October 2022, described the Appellant as a "family friend". Moreover, the judge queried the landlord's signature on the tenancy agreement which he said is differed to the signature on the letter. The judge found the Appellant's explanation for the absence of Mr Choudury at the hearing was "wholly inadequate" because he had been legally represented throughout the proceedings.
8. The judge concluded that there was no reliable independent evidence to support that the Appellant had been continuously resident between 2003 and 2009. The judge went on to dismiss the appeal under Article 8 ECHR.

The appeal to the Upper Tribunal

9. It is necessary for us to engage with ground 2 only. This raises an issue of fairness relating to what the judge said at the hearing during cross-examination. The ground says that the judge entered the arena having asked the Appellant questions about his asylum claim in 2002 and as result of what the judge said, he may have made up his mind about the Appellant's credibility before he had given evidence. In support of this grounds set out the Appellant's Counsel's notes of the hearing.

10. The SSHD did not engage with ground 2 in their response pursuant to rule 24 of the Tribunal (Upper Tribunal) Procedure Rules 2008 (“the 2008 Rules”). The matter came before us on 27 August 2024. The presenting officer was not in a position to agree the Appellant’s Counsel’s notes of the hearing. We decided that the Tribunal and the parties should listen to the cross-examination of the Appellant hearing in open court and we made a number of directions.
11. There was a resumed hearing on 28 November 2024 for the purpose of listening to the cross-examination of the Appellant. However, it came to light that the recording was incomplete. We asked Ms Cunha to confirm the position of the SSHD. She made enquiries and told us that the Appellant’s Counsel’s notes of the hearing, as set out in paragraph 8 of the grounds of appeal, were agreed. She produced a copy of the HOPO’s notes of the hearing. We proceeded with the error of law hearing.
12. The agreed Appellant’s Counsel’s notes read as follow:

“Judge, what was the basis of your asylum claim? Religious issue

Judge, what was the religious issue? Regarding Shia, Sunni different sect issue

Judge? Hatred issue

Judge, were you claiming as a Sunni Muslim you were at risk in Pakistan?
Yes

Judge, Pakistan consists of mostly Sunni Muslims? Yes

Judge, your asylum claim was completely false wasn’t it? Is that correct? It wasn’t false, I stated what was the truth”.

Error of Law- Ground 2

13. We have taken into account Ms Cunha’s submissions that what was said by the judge does not amount to apparent bias. However, we are in no doubt that there was apparent bias by the judge. We communicated our decision to the parties at the hearing and informed them that our written reasons would follow.
14. With regard to Porter v Magill [2001] UKHL 67 at [103], we have ascertained the circumstances which have a bearing on the suggestion that the judge was biased and we find that the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the judge was biased.
15. The issue in this appeal was continuous residence. There was no dispute between the parties that the Appellant had been in the UK at the time of his application for asylum and his appeal in 2002. The period of time in dispute was 2003-2009. There was no nexus between the Appellant’s asylum claim and continuous residence. We note that in respect of Article 8, the Appellant did not advance his case on the basis that he would be at risk on return. The decision of the SSHD and the dismissal of the Appellant’s appeal in 2002 are irrelevant to the consideration of the appeal before the judge.

16. The judge put it to the Appellant that he had made an asylum claim that was completely false and essentially that he had lied to the SSHD and the First-tier Tribunal in 2002. In these proceedings the SSHD did not accept that the Appellant had been continuously resident in the UK for a period of twenty years. While the Appellant's credibility was in issue the SSHD did not rely on any matter connected with the Appellant's claim for asylum in 2002 to support that he was not telling the truth. Indeed it would be absurd to rely on this bearing in mind not only the low standard of proof in asylum claims, but that it was not known whether the Appellant was found not to be credible by the First-tier Tribunal in 2002. Neither party relied on the decision in the proceedings and it was not disclosed.
17. A preliminary judicial indication could give the appearance of bias. In this case the judge in saying that the Appellant had made a completely false claim gave a premature expression of a conclusion in respect of credibility which we find indicated a closed mind and amounts to the appearance of bias: Sivapatham (Appearance of bias) [2017] UKUT 293. It would lead a fair minded and informed observer to conclude that there was a real possibility that the judge was prejudiced against the Appellant for reasons unconnected with the legal and factual issues of the case.
18. We observe that the SSHD's note of the hearing discloses that the judge asked the Appellant at least thirty four questions concerning Mr Omer after cross-examination, but before re-examination. There was some relevance in respect of where he was residing but many of the questions concerned Mr Omer's status in the UK, which was not connected with the factual or legal merits. We find that the judge's intervention strayed beyond the merely supervisory role of a judge during the taking of the evidence and led to him entering the arena. A judge's role is merely supervisory: WA (Role and duties of judge) Egypt [2020] UKUT 127. We find that the judge's questioning went beyond seeking clarification. Moreover, any questions seeking clarification should not be asked by the judge until both side have finished their examination.
19. We did not hear submissions on the rest of the grounds; however, we express concern relating to the following:
 - (1) The appeal was heard on 9 August 2023. The decision is dated 22 March 2024. For reasons that were not explained by the judge the decision was promulgated until seven months after the hearing. We are mindful of the authorities on delay, particularly SS (Sri Lanka), R (on the application of) v SSHD [2018] EWCA Civ 1391. The appeal turned on credibility, however, we did not hear submissions on whether there was a nexus between the delay and the safety of the decision. We express concern about the delay particularly as the judge does not address it in his decision.
 - (2) We note from the questions asked by the judge that it could be thought that he was assessing for himself the credibility of the Appellant's claim to be at risk on return as a Sunni Muslim (which the Appellant disclosed was the basis of his asylum claim in response to questioning by the judge). He made an assumption that the Appellant's claim was completely false because "Pakistan has a vast majority of Sunni Muslims". This supports that there was apparent bias.

- (3) The rule 24 response fails to engage with ground 2. The SSHD could have saved time and resources had they engaged with the issue. Ms Cunha on behalf of the SSHD indicated, for the first time, on 28 November 2024, that the Appellant's Counsel's notes of the hearing were accepted and the HOPO's notes were produced. There is no good reason let alone explanation why the SSHD did not pin their colours to the mast in their Rule 24 response. Had they done so there would have been no need for a further hearing or to seek production of the transcript. We remind the SSHD of the parties obligation with reference to rule 2 of the 2008 Rules and of what the Court of Appeal stated in Abdi v SSHD [2023] EWCA Civ 1455
20. We find that the error of law has been to deprive the Appellant before the First-tier Tribunal of a fair hearing. Having had regard to AEB v SSHD [2022] EWCA Civ 1512 we remit the matter to the First-tier Tribunal to be heard afresh (not before Judge Khawar).

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 December 2024