



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07694/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2018

Decision & Reasons Promulgated
On 01 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

GH (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Allan Briddock, Counsel instructed by Duncan Lewis & Co

For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals *inter alia* on procedural fairness grounds from the decision of the First-tier Tribunal (Judge Paul sitting at Taylor House on 2 February 2018) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee from Pakistan on the grounds of his claimed homosexual orientation. Judge Paul found that the appellant was not a credible witness and that he had lied about his gay status, "*primarily because it is the last way in which he can attempt to stay in this country*".

2. The First-tier Tribunal did not make an anonymity direction, but out of caution I consider that it is appropriate that the appellant is accorded anonymity for these proceedings in the Upper Tribunal given the nature of his claim.

The Reasons for the Grant of Permission to Appeal

3. On 22 March 2018 First-tier Tribunal Judge Juliet Grant-Hutchison rejected the grounds of appeal asserting that the judge had applied the wrong standard of proof and had not given adequate reasons for reaching an adverse conclusion on the core issue. But she granted permission to appeal on procedural fairness grounds:

“However it is arguable that the Judge has misdirected himself by placing weight on matters that were not relied on by the Respondent at any stage in the proceedings and without giving the Appellant the opportunity to respond to what the Judge refers to *“as the most significantly damaging piece of evidence relates to his application in May 2016”*. In turn it is also arguable that this may have infected the Judge’s reasoning in relation to the Appellant’s evidence and in relation to Articles 3 and 8 of ECHR. It is arguable that in so doing it may have made a material difference to the outcome or to the fairness of the proceedings.”

The Hearing in the Upper Tribunal

4. At the hearing before me to determine whether an error of law was made out, Mr Briddock, who did not appear below, developed the arguments raised in the Grounds of Appeal to the Upper Tribunal. Mr Tarlow adhered to the Rule 24 Response opposing the appeal settled by a colleague: *“The FTTJ has given valid reasons for refusing the claim, and the fact that the FTTJ raised the obvious point of the previous application is not an issue of fairness, rather it is as a Judge making a finding on evidence produced in support of the hearing that neither party appeared to make submissions on, but nonetheless was evidence that had been produced in support of an application.”*

Discussion

5. The relevant background is that the appellant entered the UK as a student in January 2011, and overstayed following the dismissal in 2013 of his appeal against the refusal of leave to remain as a student. He did not claim asylum until after he was detained following an enforcement visit to a residential address on 31 August 2016.
6. At the hearing, both parties were legally represented. Judge Paul directed the Presenting Officer, Ms Khan, to obtain a copy of the human rights (Article 8 ECHR) application which the appellant had made on 18 January 2016, and which had been refused and certified on 13 May 2016. After a short adjournment, Ms Khan returned with a copy of the application and a copy of the refusal decision, or just the latter. The position is not entirely clear as, in his account of the hearing at paragraphs [19] following, Judge Paul refers to the *“13 May 2016 HR Application”* and he treats the application and the refusal as being a single document, when clearly they must have been separate documents – although the contents of the application may have been reproduced to some extent in the refusal.

7. Judge Paul records in paragraph [21] that he discussed the refusal letter with the parties, and that after this discussion, he ruled that the part of the refusal letter relating to an alleged fraudulent ETS test result could not be relied on. He then comments as follows:

“However, the appellant was neither asked by the Home Office nor his Counsel as to what had been the true position, so far as the human rights application was concerned.”

8. Later in his decision, Judge Paul placed decisive weight on the contents of the HR application of January 2016 as undermining the credibility of the core claim. At paragraph [40] he held that the most damaging piece of evidence against the appellant was his HR application which was based on the fact that he had formed close family life with a friend of his father, who was actively supporting him in the UK:

“Neither of the Representatives explored this piece of evidence forensically. The difficulty for the appellant, of course, is that that application (on his own account) is false. He cannot have been living with a friend of his father who was actively supporting him if he had fled Pakistan because of his being gay and having been effectively disowned by his family. It follows that, if it was a lie, what evidence is there to show that this application is a truthful one?”

9. Judge Paul returned to this theme at paragraph [43]:

“It is trite to observe that, once an appellant has sought to deceive the Home Office, this must call into question his subsequent applications. It is a striking and surprising feature of his evidence that no attempt was made by his Counsel to seek any explanation as to why he had gone down that route at that time. It follows, therefore, that on the balance of the evidence before me, I am satisfied that the appellant is not a credible witness. I am not satisfied to the requisite standard that he is gay.”

10. In support of the contention that the above findings are procedurally unfair, the appellant’s representatives filed with the permission application the following evidence:

- (a) A witness statement from the appellant dated 9 March 2018 in which he denies telling his then representative that he was living with a close friend of his father; and in which he says that he does not know why his representative said this in the application of January 2016, which was never read back to him;
- (b) A witness statement from Counsel who appeared for the appellant before Judge Paul in which she says that the Judge asked for a copy of the refusal decision of May 2016 during the appellant’s cross-examination; and that the point made by the judge in paragraph [40] did not occur to her, and that was why she had not asked the appellant about it in conference (during a short adjournment following Ms Khan’s production of the document) or in re-examination.

11. The decision of the Judge to direct disclosure at the hearing of the 2016 HR application and the reasons for its refusal was entirely proper, as the fruits of that disclosure were likely to be of assistance to him in giving anxious scrutiny to the asylum claim, and in resolving the issue of the appellant's credibility.
12. Having obtained disclosure, and having given an oral ruling that one of the disclosed reasons for refusal could not be relied on by the respondent as undermining the appellant's general credibility, it was clear – or should have been – to the legal representatives that the remainder of the disclosed document or documents had been admitted into evidence, and they could be relied upon by either party in furtherance of their respective cases; and that, even if neither party relied on the disclosure, it was going to form part of the evidence that was going to be considered by the Judge in his deliberations on the core issue of whether the asylum claim was credible.
13. As a general rule, it is not essential that a document should have been put to a witness for comment as a necessary precursor to the judicial decision-maker drawing an adverse inference from the contents of the document in question.
14. However, on the particular facts of this case, I am persuaded that there has been procedural unfairness. The evidence of Counsel who appeared at the hearing is credible. While it was not perverse of the Judge to find that the details of the appellant's HR application in January 2016 contradicted the later claim that his family had disowned him because he was gay, this was not the only inference which could reasonably be drawn from the contents of the HR application. An alternative innocent explanation, for example, was that both the appellant and his father had chosen not to reveal to the friend that he had been disowned by the family in Pakistan because he was gay. If the Presenting Officer had considered that the contents of the application damaged the appellant's credibility in the respect outlined by the Judge (or otherwise), it would have been open to her to cross-examine the appellant on the truth of its contents. Since she did not do so, Counsel for the appellant was not alerted to the potential adverse credibility inference which is drawn in paragraph [40] of the decision so as to be able to deal with it in re-examination of the appellant.
15. I also consider that it was open to the Judge to have raised the issue of his own motion. In any event, since the issue was not raised by either the Presenting Officer or the Judge, it was reasonable for Counsel not to address it and the appellant was thus deprived of the opportunity to give the explanation which he says he would have given if he had been asked about the contents of the HR application at the hearing.
16. The Judge has set out his reasoning process with admirable candour and clarity, and so it is readily apparent that the outcome might have been different if the appellant had been questioned at the hearing about the contents of the HR application, and the Judge had been required to take into account his oral evidence on this discrete issue in his overall assessment of credibility in what was, as the Judge held, a finely balanced case. The decision is thus unsafe and it must be set aside in its entirety.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and must be remade.

Directions

This appeal is remitted to the First-tier Tribunal at Taylor House for a fresh hearing (Judge Paul incompatible), with none of the findings of fact made by the previous Tribunal being preserved.

My time estimate for the hearing is 3 hours.

Signed

Date 25 July 2018

Judge Monson
Deputy Upper Tribunal Judge