Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09441/2019
(P)

THE IMMIGRATION ACTS

Decided without a hearing **Decision & Reasons Promulgated**
On 17 June 2020

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

DELWAR HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Lucas ("the judge"), promulgated on 7 October 2019, in which he dismissed the appellant's appeal against the respondent's refusal of a human rights claim made on 29 October 2018. That refusal encompassed an allegation that the appellant had dishonestly obtained an English language test certificate in 2011 and had used that certificate in an application made on 20 November 2012. Thus, this was a case involving the well-known ETS issues within the context of a human rights claim based on Article 8.

Procedural issues

2. I have reached my decision on the error of law issue without a hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in light of the Senior President of Tribunal's Pilot Practice Direction of 23 March 2020 and the Presidential Guidance Note No 1 2020.

3. Having issued directions on 30 April 2020 indicating a provisional view that the error of law issue could fairly be determined without a hearing, both parties provided responses. The appellant's submissions in fact make no reference to whether there were objections to the absence of a hearing. The respondent did state that she requested an oral hearing, although no reasons were provided for this.

4. I have given careful consideration to the following matters:

i. the core issue of fairness to both parties;

ii. the overriding objective;

iii. the content of the grounds of appeal;

iv. the content of the parties' respective submissions on the merits; and

v. the guidance set out by the Supreme Court in Osborn v Parole Board [2013] UKSC 61.

5. The core challenge in this case is narrow in scope: did the judge err in respect of the application of the applicable burden of proof in a case involving an allegation of dishonesty against the appellant? I am satisfied that the parties have addressed this core issue in their respective submissions. No additional matters of material concern arise which might require either a further opportunity to address in writing or an oral hearing. In all the circumstances, I have concluded that it is appropriate to determine the error of law issue without a hearing.

The judge's decision

6. Having set out in summary form the evidence and the parties' respective positions, at [23] the judge directed himself that, "[t]he burden of proof is upon the Appellant and the standard of proof is of the balance of probabilities."

7. At [24] and [26] the judge placed significant weight on the appellant's assumed inability to converse in English. It was noted that the appellant had failed to produce supporting evidence of his ability in the English language. The judge goes on to note the absence of evidence of close ties in the United Kingdom, and he was of the view that the appellant had maintained good ties with Bangladesh. At [31] the judge stated as follows:

> "On the balance of probabilities, the Tribunal is satisfied that the Appellant did deploy deception in relation to the Test Certificate in 2011. The Tribunal, as said, is entitled to examine the totality of the circumstances presented in this case as well as the generic evidence of cheating produced by the Respondent."

8. The appeal was duly dismissed.

The grounds of appeal and grant of permission

9. The grounds of appeal are succinct. First, it is said that the judge erred by failing to ask the appellant at the hearing whether or not he (the appellant) could indeed speak English. Simply relying on the appellant's use of an interpreter at the hearing was an inadequate basis for making an adverse finding. Second, it is alleged that the judge failed to apply the correct burden of proof.

10. Permission to appeal was granted by Upper Tribunal Judge McWilliam on 27 February 2020.

The appellant's written submissions

11. These submissions essentially reflect the two grounds of appeal described above, albeit in reverse order. Specifically, it is said that the judge failed to apply the three-stage approach of deciding whether the respondent discharged the evidential burden; whether, on the evidence provided, the appellant had provided an explanation that was plausible/capable of belief; and finally whether the respondent had discharged the legal burden resting upon her in cases concerning allegations of dishonesty. In respect of the appellant's use of an interpreter at the hearing, it is said that the judge should have raised the issue at that stage.

The respondent's written submissions

12. The respondent acknowledges the three-stage approach applicable in cases such as the present. It is said that the judge was clearly "well aware" of the generic evidence provided by the respondent in ETS cases and that:

> "that it would be reasonable to assume that the very experienced judge knows the law in relation to ETS appeals although in this decision has not recorded the actual procedure."

13. These submissions go on to assert that the judge's failure to have set out the "tos-and-fros" is immaterial given the lack of evidence adduced by the appellant.

Decision on error of law

14. For the following reasons I conclude that the judge has materially erred in law.

15. In the context of this appeal, the judge's self-direction at [23] was clearly erroneous. There are cases in which subsequent passages in a decision indicate that the correct approach has in fact been adopted notwithstanding an apparently erroneous starting point, as it were. However, no such indications are evident from the judge's decision. There is no reference to the three-stages at any point or in any form. Whilst I

have taken the respondent's submissions into account, I am not prepared to simply assume that a correct approach must have been adopted solely on the basis that the judge was "experienced" (a similar point relied on by a Deputy Upper Tribunal Judge was regarded as inappropriate by the Court of Appeal in Asfar Uddin [2020] EWCA Civ 338, at [15]).

16. It is clear from the judge's decision that he was distinctly unimpressed by the absence of supporting evidence from the appellant. That fact clearly did nothing to further the appellant's cause. Notwithstanding this deficiency, it was incumbent on the judge to deal specifically with the evidence that he did have (which included a witness statement) and go through the three-stage process, making appropriate findings along the way. Having regard to the decision as a whole and the seriousness of allegations of dishonesty, I conclude that the judge's approach was flawed. In short terms, there is nothing to satisfactorily indicate that the judge had considered the appellant's evidence and either concluded that it did not even amount to a plausible explanation or, if it did, that the respondent had nonetheless discharged the legal burden of proof. In that sense, there was nothing to displace the initial erroneous self-direction stated at [23].

17. I also conclude that, despite the lack of very much evidence emanating from the appellant, the error was material. It is not a case that the absence of the error *would* have made a difference to the outcome, but in my view, it is the case that it *could* have done so.

18. The judge's decision must be set aside on this ground alone. None of the judge's findings are to be preserved.

19. I am bound to say that I am much less impressed by the appellant's other ground of appeal. Whilst it may have been prudent for the judge to have raised the issue of the appellant's ability in the English language himself, it really was for the appellant (and/or his representative) to lead relevant evidence. I conclude that there is no specific error in respect of the second ground. However, this does not have a material bearing on my conclusion as to the first.

Disposal

20. Remittal to the First-tier Tribunal is the exception to the rule. In this case and having regard to paragraph 7.2 of the Practice Statement and the nature and extent of the fact-finding exercise to be undertaken, I conclude that the appropriate course of action is to remit this appeal.

Anonymity

21. The First-tier Tribunal did not make an anonymity direction and there is no reason for me to do so. I make no such direction.

Notice of Decision

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

23. I set aside the decision of the First-tier Tribunal.

24. I remit the appeal to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal for a complete rehearing;**
2. **No findings of Judge Lucas are to be preserved;**
3. **The remitted hearing shall not be conducted by Judge Lucas;**
4. **The First-tier Tribunal will issue any further appropriate directions to the parties in due course.**

Signed: H Norton-Taylor Date: 3 June 2020

Upper Tribunal Judge Norton-Taylor

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email