



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10463/2019(A)

THE IMMIGRATION ACTS

On the papers on 14 July 2020

Decision & Reasons Promulgated
On 23 July 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

WARNAKULASURIYA JULIAN MATHEWS FERNANDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. On 5 September 2019 First-tier Tribunal Judge Jepson dismissed the appellant's appeal on human rights grounds.
2. Permission to appeal was granted by another judge of the First-tier Tribunal on 31 March 2020 the operative part of the grant being in the following terms:

"It is argued that the Tribunal erred in:

- a. Failing to consider the evidence from the Appellant's parents-in-law and considering it an adverse credibility point that there was no such evidence when there was. This is not arguable because Judge Jepson was clearly aware of this evidence and considered it as is demonstrated by the last two bullet points at paragraph 35.
- b. The limited weight given to the evidence from two witnesses who the Tribunal found had effectively been deceived, finding at paragraph 47 that they had not necessarily been lying but had been "led up the garden path". This ground it is arguable. It is un-clear why the Tribunal found

the witnesses had been deceived into believing that the Appellant was in a genuine and subsisting relationship with his wife.

- c. Failing to conduct a holistic proportionality assessment and give adequate reasons for the decision.

The second and third grounds are arguable.

3. In light of the Covid-19 Pandemic directions were given by the Upper Tribunal advising the parties that the Upper Tribunal had reached the provisional view that it will be appropriate in this case to determine the question of whether the First-tier Tribunal decision involved the making of an error of law and if so whether the decision should be set aside on the papers. The directions also contain specific time limits to enable the parties to make submissions in response to this provisional view and to make further submissions in support of their respective cases, if they wish to do so, in any event.
4. Response have been received from both the appellant and respondent's representatives.
5. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
6. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
7. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:
34. –
 - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
 - (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings. (4) Paragraph (3) does not affect the power of the Upper Tribunal to –
 - (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
 - (b) consent to withdrawal, pursuant to rule 17;
 - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
 - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.
8. The parties make no specific submission upon the mode of hearing preferring instead to set out their arguments for why, in the case of the appellant, the decision should be set aside and the appeal remitted with the case for the respondent being that the Judge has made no material legal error.
9. Having considered the interests of fairness, justice, and the overriding objectives I find it is appropriate in the circumstances in this case to determine the two

questions referred to above on the papers. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers as it has not been made out consideration of the issues on the papers is not in accordance with the overriding objectives and the principle of fairness at this stage.

Background

10. The appellant, a citizen of Sri Lanka born on 29 July 1993, applied for leave to remain in the United Kingdom on human rights grounds on 20 November 2018. That application was refused by the Secretary of State in a decision dated 30 May 2019.
11. The appellant's immigration history was noted by the decision-maker who records that the appellant entered the United Kingdom on 28 March 2017 at Stansted Airport and claimed asylum the same day. The asylum claim was refused against which the appellant appealed to the First-tier Tribunal who dismissed the appeal. The appellant became appeal rights exhausted on 29 May 2018.
12. The application made on 20 November 2018 was on the basis of the appellant's family and private life in the UK. The appellant claimed to be in a relationship in the UK with his partner Mathusa Nadarasalingam but was not found to be so entitled, as the decision-maker did not accept the appellant could meet the Eligibility requirements in paragraph E-LTRP.1.1 to 1.12 on the basis his relationship was not considered to be genuine and subsisting even though the appellant and his partner were married. It was claimed the appellant had failed to provide sufficient evidence to show he was cohabiting with his partner. It is also said, relevant to E-LTRP.2.1, that the appellant could not satisfy this requirement as he has remained in the UK illegally since he entered on 28 March 2017 and was currently on immigration bail.
13. There is no evidence the appellant has a child in the United Kingdom.
14. The decision maker concluded the appellant could not succeed under paragraph 276ADE (1) for the reasons set out in the Reasons for Refusal letter.
15. Thereafter the decision-maker considered whether the appellant had established exceptional circumstances sufficient to warrant a grant of leave to remain outside the Immigration Rules concluding that the decision was proportionate and that the public interest outweighs the matters relied upon by the appellant in support of his claim.
16. The Judge, in addition to considering the documentary evidence, had the benefit of seeing and hearing oral evidence being given. The Judge notes at [16] the agreed facts including that the appellant's partner has settled status in the UK by virtue of an asylum claim. She is also a Sri Lankan national.
17. The Judge sets out findings of fact from [29] in which it is recorded that the core issue in the cases that of credibility. The Judge notes at [34] what are described as "a lot of quite startling omissions in the case" said to be summarised but not limited to the five issues recorded. At [35] the Judge records that a further issue relates to the significant number of discrepancies which "litter this case" many arising from the marriage interview which were found to include but not be limited to the eleven items recorded. The Judge does not accept the appellant's

- wife's explanation relating to the interpretation at the marriage interview as being plausible.
18. The Judge notes at [40] what is described as a "slightly bizarre refusal" of the appellant to accept matters which had been conceded on his behalf by the appellant and at [41] the appellant's wife's evidence including repeated references to what her husband had said when challenged.
 19. The Judge records some of the documentary evidence appearing dubious at [44] and concerns regarding the evidence of the witnesses to which further reference shall be made below. At [50] the Judge specifically states that having taken things in the round he did not accept what he was being told, did not believe the relationship was genuine, and that the appellant is somebody who will do and say anything to remain in the United Kingdom. The Judge finds there are no serious obstacles to reintegration [51] and nothing exceptional about the case [53]; making the decision proportionate.
 20. The appellant asserts the finding at [45] is not supported by adequate reasoning, at [47] the Judge did not explain how he thought the witnesses had been "led up the garden path" resulting in the appellant being denied the benefit of important witness evidence on an erroneous basis. The appellant asserts if the Judge found the oral evidence to be implausible, incredible, or unreliable, it was necessary to say so in the determination and for the findings to be supported by adequate reasons, as a bare statement a witness was not believed or that the document was afforded no weight is insufficient. The grounds are set out in further detail in the pleadings of 16 September 2019.

The further submissions

21. The appellant's further submissions dated 23 May 2020 repeat the core of the challenge to the decision, relevant paragraphs of which are in the following terms:
 3. The core of this appeal is the fact that the Judge at first instance, Judge Jepson, failed to properly weigh and balance important witness evidence.
 4. The Tribunal is invited to consider the grounds of appeal and having done so will be aware from those grounds that at paragraph 45 of the First-Tier Tribunal determination Judge Jepson stated:

"What then of the two witnesses who testified before me? At first blush, each seems entirely credible. However, it must be right that the evidence given is in part only as good as its primary source - the Appellant."
 5. As stated in the grounds of appeal the Judge provides no explanation how or in what ways the appellant was the primary source of the witness evidence. Each witness set out how they knew the appellant and his wife and that they had known them for some time. That evidence was open to cross-examination.
 6. As set out in the grounds of appeal it is the appellant's contention that the Judge has failed to provide any or any adequate reasons for his findings and failed to properly consider and weigh important witness evidence before him when coming to the conclusions he has. This evidence included oral witness evidence which it is submitted the Judge has failed to properly address.

7. It is of particular concern that the Judge has said “at first blush” he found the evidence credible. The Judge provides no explanation about how or in what way the appellant was the primary source of that evidence. The evidence was first hand evidence of what the witnesses could see and know of the appellant over a period of time having known the appellant and his wife and having had regular contact with them over a period of time. Having found that evidence credible, at first blush, it is submitted it was incumbent on the Judge to explain how the appellant was the source of that evidence.
 8. The findings become even more troublesome when at paragraph 47 of the determination the Judge finds witnesses of being “led up the garden path” but does not say how or in what way that is so.
 9. It is submitted the appellant has been denied the benefit of important witness evidence on an erroneous basis.
 10. As set out in the grounds of appeal it cannot be said that somehow the Judge’s other findings mitigate his failure to properly take into account the above-mentioned witness evidence as if he had taken that evidence into account, particularly as first blush he found the witness evidence credible, it may well have less than the negative effect of his other findings.
22. The Secretary of State has filed a Rule 24 response dated 4 June 2020 in which it is asserted:
2. In response to the directions sent 12 May 2020, the SSHD opposes the appeal of the appellant and submits that the First-Tier Tribunal Judge (FTTJ) directed himself appropriately. In drafting this response the SSHD has not received any further representations from the representatives.
 3. It is noted that in granting permission the grounds are limited to that relating to the witness evidence [47] and as a consequence the overall proportionality assessment due to the inadequacy of reasons.
 4. The FTTJ identifies a series of omissions where evidence could have been provided at [34] and a series of inconsistencies in the evidence of the appellant and his wife at [35]. These are in effect unchallenged findings. Likewise it was open to the FTTJ to reject the attempted explanations for these inconsistencies at [37 – 42] again these findings are unchallenged. Nor is there challenge to the observations at [44] in relation to documentary evidence relied upon. This forms the background and core of the assessment as to whether the relationship is genuine or not, which is accepted as the key issue in the appeal [29–30] and para 2 of the grounds.
 5. In addressing the witness evidence at [45 – 47] the FTTJ was entitled to note that it was limited by virtue of the fact that the witnesses did not see the appellant and his wife on a daily basis. It was also open to the FTTJ to note that there was an absence of supportive evidence from the church to support the claim that is how they know the appellant and wife. It stands to reason that if the assessment conducted in the round as per [50] results in a conclusion that the relationship between the appellant and wife is not genuine, then either the witnesses were not truthful or were being misled. That much is set out at the end of [45] where the FTTJ notes that a person in a persistent attempt to remain in the UK could put up a ‘good front’ to convince others of his circumstances. In describing the appellant as the ‘primary source’ of information to the witnesses, it is plain and obvious that any observations of the appellant’s relationship were of what could be described as a ‘front’.

6. It is submitted that the background and core unchallenged findings made in terms of the evidence of the appellant and wife provide clear reasons for rejecting the relationship. This in conjunction with the limitations identified by the FTTJ set out why the FTTJ found the witness evidence to be of limited assistance. Rather the determination should be read as a whole given it provides a number of clear and cogent reasons for rejecting the relationship. Given the relationship is rejected, a proportionality assessment of family life is not material or relevant. It is submitted that the grounds do not disclose material error of law and amount to no more than disagreement.

Error of law

23. It is not disputed by any party that there is a legal obligation upon a decision-maker to consider the evidence made available with the required degree of anxious scrutiny and that a Judge, in addition to making findings of fact, provides adequate reasons for why such findings have been made to enable a reader of the decision to understand the basis on which they either won or lost the appeal.
24. The Judge was aware the appellant had a previous appeal and there is within the First-tier Tribunal file an earlier decision of First-tier Tribunal Judge Shergill promulgated on 14 March 2018 which dismissed the appellant's asylum and human rights claim. Within that determination Judge Shergill found the appellant's entire account was highly implausible. At [70] of the decision Judge Shergill wrote:
70. I have considered the benefit of the doubt and principles rising from case law. Given the various discrepancies and inherent implausibility in the appellant's claim when assessed at the lower standard the benefit of the doubt does not assist the appellant. He gave some detail in some areas but I formed the impression some key aspects were rehearsed. In other areas he was vague and inexplicably so or brushed over. His account has remained broadly consistent in terms of the bare bones of the story but it is a relatively simple story that its heart. There are other aspects which have morphed or expanded. When assessing all of the evidence in the round to the lower standard, I was not persuaded he was being truthful in his evidence.
.....
72. For all these reasons, I have decided that the appellant has fabricated the accounts in order to come to and to remain in the United Kingdom and that he is not at risk as claimed. In those circumstances the issues of sufficiency of protection and further fear do not arise because I do not accept that there is a genuine fear because the authorities are not interested in him, nor have they been when assessing all of the evidence in the round to the lower standard. Having concluded that the basic premise of his accounts is untrue there is therefore no Convention reason which is made out.
25. Judge Shergill considered, in addition, the appellant's human rights claim recording at [79 – 80]:
79. The appellant references Article 8 issues but there has been minimal evidence advanced by him; the issue was in effect abandoned at the hearing. I would observe for the sake of completeness that the claimed relationship was poorly

evidenced. I had an untruthful appellant before me who miraculously started a relationship the same month he was interviewed. He also managed to make a friend within weeks of arrival because by his own account he knew people here. I drew the firm conclusion the appellant has been highly motivated to come here and remain here. Whatever the position, I was far from persuaded that there was family life engage in Article 8, and if it did, his adverse history far outweighed his family life claim. He has only been here a short time and see no basis upon which he can claim very significant obstacles.

80. In light of my conclusions about the motives for the application there is a strong public interest in favour of maintaining the economic interests of the United Kingdom by enforcing proper immigration control in this case. That far outweighs any Article 8 claim of interference with private or family life in any event and that is my assessment under and outside there are a lack of quite startling omissions in this case the rules.

26. As noted above the Judge records concerns at [34 - 35] which are in the following terms:

34. There are a lot of quite startling omissions in this case. These can be summarised, but are not limited to the following -

- If, as is claimed by Mrs Muhunhakumaran, the Appellant, his wife, and all witnesses all go to the same church, why is there no independent evidence of this? It would not have been difficult to ask the pastor (or equivalent) to provide at least a letter.
- Why did the Appellant's Guardian not appear before me? He would seem an obvious witness to call. Mr Timpson argues that his solicitors had to be selective in the evidence they bring to court. Whilst I agree there is always a risk of overkill, surely this person would have been of greater value than his wife?
- Why, equally, was there no statement from Mrs Nadarasalingam's parents?
- The evidence from the landlord is suspicious at best. An undated letter, lacking a letterhead does not strike me as being at all genuine. I am also concerned about the assertion from Mrs Nadarasalingam, who of course is the tenant of the property, that she had no idea of the name of her landlord. Why would this be the case? Even if, as claimed, the Appellant dealt with that, one would have thought given it is Mrs Nadarasalingam pays the rent she would have an idea to whom the bill is paid. I was concerned about the odd assertion from the Appellant in his verbal evidence that the author of the letter had never in fact met him or been in the house. The letter had simply been emailed. This was doubly unusual, given it is Mrs Nadarasalingam who pays the rent.
- On a related note, it seems odd to me (per the Appellant's evidence evidence) that the letters contained in the bundle had been sent to Mr Fernando, rather than to his solicitors; a strange way in which to prepare a case.

35. Other issue relates to the significant number of discrepancies which litter this case. Many of these arise from the marriage interview. As with the omissions above, this includes but are not limited to -

- The completely different account given as to what the couple had done the previous weekend.

- The discrepancy over when marriage was proposed - the Appellant said 29th of December 2017, whereas Mrs Nadarasalingam stated '... There was no set date if proposal'.
- Each claimed to have been the one who proposed marriage to the other, under different circumstances.
- As per evidence given in Court - the Appellant described how their address had been inspected by a woman. His Wife thought it was a man. Oddly, the gender of the owner of the property (on the Appellant's verbal evidence) varied as he testified.
- The bizarre assertion, albeit corrected in Court, from Mrs Nadarasalingam that she does not have a tattoo. Despite that, the Appellant described such tattoo in detail. One might have thought a suitably discreet photograph could have been produced in Court. Otherwise, I am left with the lingering doubt that the parties have simply got their heads together after realising the obvious difference in answer.
- The different address exhibited to the Appellant's Guardian by each party. It is telling that the Appellant is the one who gets this 'wrong'.
- A completely different series of events given by each when asked what they had done the previous weekend. The Appellant thought they had gone shopping for his birthday (which he would remember) whereas Mrs Nadarasalingam believed she had worked then come home to watch a film together. When challenged about that in Court, Mr Fernando said he couldn't remember what they had done. If that were right, why say otherwise in the interview?
- The utterly different account as to what the Appellant had given Mrs Nadarasalingam for her birthday. He thought nothing, whereas Mrs Nadarasalingam described receiving money. An attempt to explain this away in Court as confusion (the money purportedly came in an entirely blank card which was summed as being from the Appellant) was frankly unbelievable.
- The Appellant had thought to the floor as their bedroom was carpeted. His Wife described it as wooden.
- Per his verbal evidence, Appellant claimed in Court the letter from his wife's parents had been sent to him directly via social media. By contrast, Mrs Nadarasalingam said the latter had been sent to herself. Both cannot be right.
- On a similar topic, Mrs Nadarasalingam explained in Court that her parents knew about the Appellant's status as a failed asylum seeker. Mr Fernando claimed to know nothing of that. It would, I find, have been something that the couple would have discussed, especially given the parents were to be approached to provide a letter of support.

27. The appellant specifically challenges the Judge's treatment of the witness evidence claiming the Judge does not adequately explain the findings. The grounds refer specifically to [45] and [47] but it is important when considering this ground to pay due regard to [45 - 50] which are in the following terms:

45. What then the two witnesses who testified before me? At first blush, each seems entirely credible. However, it must be right that the evidence given is in part only as good as its primary source - the Appellant. These are not people who see the couple each day, so cannot intrude comment comprehensively on whether the relationship is genuine or not. If this case involves a determined attempt to remain in the UK, it is far from impossible to imagine someone putting up 'a good front' so as to convince others of his circumstances.
 46. I also note the lack of anything objective to support what the witnesses have to say, such as evidence of church attendance. I haven't even been told the name of the church in question.
 47. Do I find that the last two witnesses are lying to me? Not necessarily. At the very least, however, I find they had been led up the garden path.
 48. Although I acknowledge there are some photographs included in the bundle, those I find of limited value given the overall concerns I have about the other evidence given.
 49. Nor is there much to show the couple even live together. Mr Timpson urges me to the view that, were they conniving, they could have easily added the Appellant's name to bills. That may be right, but the fact that there isn't anything but a council tax bill leads me to the irresistible conclusion that the Appellant does not in any meaningful sense live with his Wife.
 50. Taking things in the round, I simply don't accept what I am being told here. I do not believe the relationship is at all genuine. Rather, to my mind the Appellant is someone who will do and say anything to remain in the UK.
28. What a reading of the determination as a whole shows is that the Judge clearly considered all the available evidence in the round before deciding what weight could be attributed to the material received. The Judge identifies shortfalls in the evidence but also specifically comments upon the evidence actually given. The comment by the Judge that the evidence of the two witnesses who testified before him initially appeared entirely credible demonstrates the Judge did not approach that evidence with a closed mind despite the earlier decision making a number of adverse credibility findings against the appellant. The Judge's observation that the evidence is only as good as its primary source is not an absolute statement as the Judge qualifies it to state that it is 'in part'. The Judge explains this comment by reference to the fact the witnesses exposure to the appellant and his wife is limited meaning they were unable to comment comprehensively upon the whether the relationship is genuine or not. This is a finding available to the Judge on the evidence. If a person only has limited knowledge of a particular topic their evidence can only reflect that which is known to them. The witness may be able to repeat what somebody has told them but that does not necessarily mean that the evidence they are giving of what they have been told reflects the truth of the situation, even if they themselves believe it. This is also the basis of the Judge's finding at [47] where he again gives the two witnesses the benefit of the doubt. The Judge does not find the witnesses were telling lies but finds the evidence that they were giving, some of which originated from the appellant, was not true. This is clearly demonstrated by the Judge's conclusion at [50] that he did not accept what he

was being told. The findings are adequately reasoned and have not been shown not to be available to the Judge on the evidence.

- 29. I do not find it made out that the Judge failed to consider all the available evidence both individually and cumulatively. I do not find it made out that the Judge took an irrational approach to such evidence or applied the weight to that evidence that he was not entitled to do. Weight is a matter for the Judge.
- 30. The Judge clearly considered the photographic evidence in the round with the other material. When reading the decision as a whole it is quite clear that the Judge's findings are that notwithstanding the material the appellant sought to rely upon at the appeal that material was not sufficient to enable the appellant to discharge the burden of proof upon him to show that what he was claiming is true.
- 31. Whilst the appellant disagrees with the Judge's finding that the relationship is not genuine, and clearly wishes to remain in the United Kingdom, the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this appeal.

Decision

- 32. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.



Signed.....
Upper Tribunal Judge Hanson

Dated the 14 July 2020