Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08556/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 9 July 2019	**On 17 July 2019**

Before

THE HONOURABLE MRS JUSTICE CUTTS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM

Between

MS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel, instructed by Sky Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

This is an appeal against a decision of First-tier Tribunal Judge Hamilton promulgated on 10th December 2018 whereby the Appellant's appeal against the Secretary of State's decision was dismissed.

The appeal is out of time by approximately 3 months. In the course of the hearing we reconstituted ourselves as a FtT bench in accordance with *Samir (FtT Permission to appeal: time) [2013] UKUT 00003* and extended time within which to appeal. We did so for the reasons we then gave. Applying the principles set out in *Secretary of State for the Home Department v SS (Congo) & others [2015] EWCA Civ 387* we were satisfied:

i) Firstly that the delay in bringing the appeal was significant relevant to the 14 days within which the Appellant should have appealed.

ii) Secondly that there were good reasons for it. The circumstances of the appeal are highly unusual. Put simply we can see why the Appellant had sought to withdraw his human rights appeal before the FtT. This was because he had an extant Judicial Review application in which he contested the assertion of the Secretary of State that he had used deception in a TOEIC ETS test sat on 20th June and 13th October 2012. He understood that he could not establish that he had been living in the UK in accordance with the Immigration Rules until his judicial review was determined and did not therefore believe he could succeed in the appeal. The Appellant did not appreciate that the FtT might refuse his application to withdraw his appeal and hear the case in his absence or that the Secretary of State would rely on the decision made by the FtT when challenging his Judicial Review application. In addition to these factors there has been a highly material change in the law upon which the judge of the FtT relied in rejecting the Appellant's application to withdraw and to proceed in his absence.

iii) Finally we were mindful of the overriding objective set out in *Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008* that this Tribunal must deal with the case fairly and justly. We were satisfied that, in the unusual circumstances of this case, such made it appropriate to extend time.

Procedural chronology

Given the grounds of this appeal it is necessary to set out the chronology of the case in a little detail.

iv) The Appellant, a Pakistani national, was born in October 1984. He entered the United Kingdom in May 2008 on a student visa, valid until 30th September 2011. There followed various applications for further leave to remain. These involved sitting a TOEIC ETS test on 20th June and 13th October 2013.

v) On 27th November 2014 he was served with an IS151A in which the Secretary of State alleged that he had used deception in the course of those tests.

vi) In February 2015 the Appellant challenged that decision by way of Judicial Review. This application was refused on 12th August 2016.

vii) On 26th April 2017 the Appellant applied for leave to remain on human rights grounds. This was on the basis that since 2013 he had been in a relationship with a British national.

viii) On 26th March 2017 his application was refused by the Secretary of State on the grounds:

a) That his presence was not conducive to the public good;

b) That his relationship could continue abroad;

c) That there were no very significant obstacles to his integration into Pakistan;

d) That there were no exceptional circumstances.

ix) The Appellant appealed this decision to the FtT on 6th April 2018.

x) On 24th April 2018 the Tribunal directed the Appellant to provide copies of all documents upon which he wished to rely as soon as they were available.

xi) Meanwhile the Appellant had applied to reinstate the Judicial Review Application which had been dismissed in 2016. By Order dated 20th June 2018 the Upper Tribunal notified him that this application had been stayed pending the decision of the Court of Appeal in *R (on the application of Rajib) and others v SSHD C8/2016/1036A* relating to the reopening of cases following a change in the law. This case was due to be heard on 6th November 2018.

xii) On 3rd October 2018 the Appellant sought an adjournment of the appeal. He argued that his Judicial Review claim was pending. If he succeeded in that claim he would arguably hold lawful leave to remain from May 2008 which would mean he would qualify for Indefinite Leave to Remain on the grounds of his 10 year residence. This application was refused on 8th October 2018 and his appeal was listed for hearing.

xiii) The Appellant sought then on 11th October 2018 to withdraw his appeal.

xiv) On 10th December 2018 the judge of the FtT promulgated his decision to refuse the Appellant's application to withdraw his appeal, to hear the appeal in the Appellant's evidence and to dismiss the appeal.

xv) On 6th March 2019 the Appellant received a letter from the Secretary of State indicating that he objected to his application to re-instate his Judicial Review application. He relied in part on the finding of the FtT on the issue of deception.

The hearing in the First-tier Tribunal

On 15th October 2018 the Appellant's appeal hearing was listed before the FtT. He did not attend, nor was he represented. It is clear from paragraph 13 of the decision promulgated on 10th December 2018 that the Tribunal had received no documents from the Appellant. There was before the FtT a letter dated 21st October 2018 from those representing the Appellant stating his wish to withdraw the appeal.

1. The judge, applying the law as set out in the judgment of the Upper Tribunal in *TPN (FTT appeals – withdrawal) Vietnam [2017] UKUT 00295*, held in paragraph 23 that:

> "*Appellants do not have a right to withdraw their appeals. They may only do so with permission. In order to obtain permission they must provide a satisfactory explanation for their withdrawal application. Failure to do this will almost inevitably lead to the application being denied.*"

He found that it was reasonable to infer that a represented Appellant had competent representatives who were aware of this and who would have advised him accordingly. On this basis he found that the Appellant was aware of the hearing and had chosen not to attend.

The judge held that the Appellant had shown no good reason for granting him permission to withdraw his appeal. It was wrong in principle to allow an appeal to be withdrawn on the mere prospect of a change in the law. There was no way of knowing when the Court of Appeal would hand down its decision or when the Appellant's application to reinstate Judicial Review proceedings would be considered. In addition, the Appellant had failed to provide details of the basis for his Judicial Review application and why the issues the Upper Tribunal would have to determine could not be determined within the appeal listed that day.

For all these reasons the judge held at paragraph 33 that it was fair and in the interests of justice to proceed in the Appellant's absence.

The judge then went on to consider the appeal and the evidence upon which the Secretary of State relied to establish that the Appellant had used deception in his tests. Neither party was present and so no oral submissions were made. In the course of his decision the judge set out the relevant law and the test which he had to apply. He assessed the evidence contained in the bundles provided by the Respondent and found, at paragraph 60, that he had discharged the evidential burden of proof. He said this:

> "*The Appellant has not provided any evidence to rebut the allegation of dishonesty. I am therefore satisfied on the balance of probabilities that the Respondent has shown that the Appellant obtained his English language certificate from LST by fraud. It follows the Appellant used fraud/deception/dishonesty when he submitted this certificate in support of his application for further leave to remain in the UK.*"

In reaching his decision on proportionality the judge held at paragraph 68 that the public interest in maintaining immigration controls and "deterring the sort of abuse the Appellant was involved in is very strong indeed." (our emphasis).

The change in the law with regard to applications to withdraw appeals.

The procedure for the withdrawing of an appeal is set out in *Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.* In summary this states that a party may give notice of the withdrawal of their appeal and, whether done in writing or orally, must specify the reasons for it.

It is common ground that the FtT judge correctly stated the law as it was at the time when he held that appellants did not have the right to withdraw their appeals but could only do so with the permission of the Tribunal on receipt of a satisfactory explanation for so doing. Failure to do this would

almost inevitably lead to the application being denied. This was the ratio in the *TPN* case.

However, in *Waseem Anwar v SSHD [2019] UKUT 00125 (IAC),* a recent and subsequent decision of the President and Vice President of the Upper Tribunal and the President of the First-tier Tribunal, Immigration and Asylum Chamber promulgated on 4th March 2019, it was held that *TPN* misconstrues rule 17 of the FtTIAC Rules. In paragraph 46 of the judgment the Upper Tribunal sets out its conclusions that:

xvi) The decision whether to withdraw the appeal is for the appellant;

xvii) That decision does not require judicial approval in order for it to be effective;

xviii) If an issue arises as to whether a withdrawal was in fact the appellant's decision (i.e. whether it was valid), it is for a judge of the First-tier Tribunal to decide it; as to which the reasons for withdrawal may assist.

At paragraph 41 the Upper Tribunal considered the position, as was the case in this appeal, should the notice of withdrawal not be accompanied with reasons. In those circumstances the Tribunal, as with any failure to comply with a requirement of the FtTIAC Rules, has power under rule 6 to take such action as it considers just, which may include waiving the requirement or requiring the failure to be remedied. In practice the Tribunal's administration can be expected to request reasons where none have been provided.

In paragraph 45 of the judgement the Tribunal held that where the FtT considers that the reason given for withdrawal raises an issue as to whether the appellant's notice of withdrawal is in fact legally valid or where it is subsequently asserted that it was not validly given the FtT should exercise its case management powers under rule 4 to decide the matter. The task for the judge in those circumstances is to pronounce on the issue of validity. This would normally involve a hearing.

It is common ground that this judgment represents a material change in the law.

Grounds of appeal

The Appellant contends that the judge of the FtT applied the incorrect test and misunderstood the law. Although his reliance on *TPN* as correctly stating the law at the time cannot be criticised it is now plain from *Anwar* that this test was wrong. This is declaratory of the law as it always should have been interpreted.

The FtT judge's assertion that the Appellant did not have the right to withdraw his appeal without permission was therefore an error of law. It was material because the judge then went on to hear and dismiss the appeal.

In the absence of reasons for his withdrawal the judge should have called for such under rule 6. If he had any doubts as to its validity the correct course would have been for him to have directed the parties to a hearing to determine the matter.

By failing to allow the withdrawal and continuing to hear the appeal which he was not entitled to do, the judge caused real prejudice to the Appellant by, in his absence, making a finding of deception on his part.

In the circumstances the Upper Tribunal is asked to set aside the decision below and to remit the case to the FtT to be heard by a different judge.

Respondent's submissions

The Respondent submits that the judge correctly applied the law as it was at the time of the hearing. The judge cannot be said to have erred in failing to apply case law that came into existence some 3 months after the appeal was determined.

Even had the case of *Anwar* been applied the judge's conclusions would not have materially been affected. The Appellant had failed to give any

reasons as to why a withdrawal was sought. In those circumstances he could not have found the withdrawal was legally valid.

The Appellant was legally represented and could have been expected to know that he may not have been granted permission to withdraw his application. He knew of the appeal date and could have attended. In his absence the judge cannot be criticised for proceeding in his absence.

Discussion

There can be no doubt that the decision in *Anwar* represents a material change in the law. We agree with the submissions of the Appellant that this decision is declaratory of the law as it should always have been interpreted.

The Upper Tribunal has now made it plain that a decision to withdraw does not require judicial approval. In our view in this case, had the judge below applied the law as stated in *Anwar*, he could not have denied the Appellant permission to withdraw his appeal. We accept that the absence of reasons for withdrawal may well have caused him concern as to its validity. As *Anwar* makes clear, in those circumstances he should have called for an explanation and, if in doubt, have directed the parties to attend to address him on the issue. There is nothing to suggest, had he done so, that he would have inevitably found the withdrawal invalid.

It follows that we are satisfied that the FtT judge applied the wrong test. His assertion that the Appellant did not have the right to withdraw his appeal was a material error of law. We can see no circumstances, had he applied the correct test, in which he could then have proceeded to hear the appeal, make the factual findings that he did and to dismiss the appeal. The appeal must succeed on this ground alone.

Even if we are wrong in our view expressed in paragraph 23 that the decision of the Tribunal in *Anwar* is declaratory of the law as it should always have been interpreted and therefore in our conclusion that the judge applied the wrong test, we would nonetheless allow this appeal. This is because

the judge's decision to proceed with the appeal in the Appellant's absence was in all the circumstances of this case in our view procedurally unfair. His failure, when considering whether it was in the interests of justice to proceed in absence, to consider the seriousness of the allegation to be tried, the likely impact of the lack of evidence on his final decision and the consequences to the Appellant of an adverse finding amounts to an error of law.

Rule 2 of the *Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014* sets out the over-riding objective which is by Rule 2(1) to enable the Tribunal to deal with cases fairly and justly which includes by Rule 2(2)(a) dealing with cases in ways which are proportionate to the importance of the case and the complexity of the issues.

Rule 28 deals with the hearing of an appeal in a party's absence. It reads as follows:

> *"28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –*
>
> *(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and*
>
> *(b) considers that it is in the interests of justice to proceed with the hearing."*

The judge at paragraphs 22-33 of his decision sets out his reasons for determining that it was fair and in the interests of justice to proceed in the absence of the Appellant in this case. These relate principally to the fact that he was aware of the hearing, of the fact that permission to withdraw the appeal may not be allowed and that he had failed to serve any documents having been invited so to do. At no point in the decision does the judge consider the importance of the case, the complexity of the issues or the prejudice to the Appellant in proceeding in his absence.

This was an appeal which involved an allegation by the Secretary of State that the Appellant had engaged in deception in his English tests in 2013. The effect of a finding of deception was set out by the Court of Appeal in *Ahsan and others v SSHD [2017] EWCA Civ 2009* at paragraph 20. In that paragraph Lord Underhill stated that it was common ground that a finding of "deception" would prejudice the chances of an Appellant obtaining leave to enter the United Kingdom in the future. Where a person has previously used deception in order (broadly) to obtain leave there will be a mandatory ban on the grant of leave to enter or remain for a period of between one and ten years, the length of the period depending on whether they left the UK voluntarily and at their own expense. Even in circumstances which do not attract a mandatory ban, leave to enter or remain will "normally" not be granted where there has been such deception and there are aggravating circumstances. The court held in paragraph 21 that more generally it is self-evident that an official finding that a person has cheated in the way alleged in these cases may become known to others, in which it is likely to be a source of shame and to injure their reputation. It is clear from these paragraphs, if it was not before, that a finding of deception is a serious matter with profound consequences for the person involved.

As the judge noted in paragraph 59 of his decision the authorities, including *R (on the application of Abbas) v SSHD [2017] EWHC 78 (Admin)*, have made clear that in ETS/TOEIC cases there is a three stage approach to the evidence. First it is for the Secretary of State to discharge the evidential burden of proof that there was deception. If that is done it is then for the Appellant to provide plausible evidence to rebut the allegation of dishonesty. The final burden of proof is on the Respondent to establish, on the balance of probabilities, that an Appellant's prima facie innocent explanation is to be rejected. This is the approach that he adopted in this case. As he stated "the Appellant has not provided any evidence to rebut the allegation of dishonesty". On that basis he found for the Respondent and dismissed the appeal.

Such a determination was, in the absence of the Appellant, almost inevitable. It is difficult to see how an absent appellant who has provided no evidence could ever rebut such an allegation. It is for this reason that in our view judges should exercise great care before determining that proceeding in absence is “in the interests of justice”. This is particularly so in the context of a decision which has such serious consequences.

We are not saying that a judge can never proceed in absence where an allegation of deception is made by the Secretary of State. We are however of the view that a judge should do so with a degree of caution. In this case the judge had no explanation at all for the failure of the appellant to attend. We consider that he should, in the exercise of his case management powers, have directed that the parties attend for oral submissions to be made in order that he could satisfy himself that the Appellant understood the consequences of failing to call any evidence on the question of deception.

Further, we see nothing in the judge’s decision to show that when considering the interests of justice, he considered the seriousness of the allegation, the likely impact of the lack of evidence on his final decision and the consequences to the Appellant of an adverse finding.

For these reasons the judge, in our view, failed to give adequate reasons as to why it was in the interests of justice for him to proceed in absence and such was an error of law. We also consider it procedurally unfair in all the circumstances of this case that he proceeded in absence without any attempt to hear from the Appellant on the point. For these reasons we allow the appeal.

Notice of Decision

The decision by the First-tier Tribunal involved the making of an error on a point of law. The decision is set-aside.

The case is remitted to the First-tier Tribunal for a fresh hearing before a judge other than judge of the First-tier Tribunal Hamilton.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Mrs Justice Cutts DBE Date: 12/07/19