



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-000603
First-tier Tribunal No:
PA/01961/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 June 2024

Before

**UPPER TRIBUNAL JUDGE MACLEMAN &
DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

Between

**IA
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bradley of AJ Bradley & Co, solicitors

For the Respondent: Ms E Blackburn, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh, on 12 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. We make an anonymity direction because this appeal arises from the appellant's protection claim.
2. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Buchanan, dated 14 July 2021.

Background

3. The Appellant says that he is a Rohingya Muslim and a national of Myanmar who was born on 08 July 1988. The respondent believes the appellant is a national of Bangladesh.
4. The appellant says he arrived in the UK in 2006. He claimed asylum on 13 July 2016. That claim was refused. An appeal against refusal was dismissed by the First-tier Tribunal on 13 July 2017. The appellant's rights of appeal were exhausted on 4 January 2018. On 16 December 2019, further submissions were made by the appellant.
5. On 14 February 2020, the respondent refused the claim made in the further submissions.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Buchanan ("the Judge") dismissed the appeal on all grounds.
7. The appellant lodged grounds of appeal. Both the First -tier Tribunal and the Upper Tribunal refused permission to appeal. The appellant sought Judicial Review of the Upper Tribunal's refusal of permission to appeal. The Judicial Review procedure was settled by joint minute in which the respondent accepted that there was an arguable material error of law in the Judge's decision on grounds of procedural fairness. The appellant maintains that all grounds of appeal submitted to the Upper Tribunal identified arguable material errors of law.
8. On 02 November 2022 the Upper Tribunal granted permission to appeal.

The Hearing

9. For the appellant, Mr Bradley moved the moved the grounds of appeal. He told us that the respondent was not represented at the hearing before the First-tier Tribunal. He said that the Judge's decision has its foundation in matters which

were not put to the Appellant's representative nor the Appellant by the Judge during the hearing. He said that procedural fairness requires a proper opportunity to deal with any issues which are later relied upon by the Judge in reaching a decision. He referred us to HA and TD v SSHD [2010] CSIH 28

10. Mr Bradley took us to [10] to [16] of the decision and told us that the matters discussed there by the Judge form no part of the Respondent's reasons for refusal and were not put to the appellant. He reminded us of the guideline in *Surendran* (19197), and told us that the Judge had not followed those guidelines. Instead, he had assumed an inquisitorial role.

11. Mr Bradley told us that at [10], [12.2], & [13] of the decision the Judge failed to reconcile conflicts in evidence, and so failed to have regard to all material considerations.

12. Mr Bradley told us that at [15] of the decision the Judge made irrational findings about documentary evidence.

13. Mr Bradley said that at [17.4] the Judge gives inadequate reasons for rejecting expert evidence.

14. Mr Bradley asked us to allow the appeal and remit this case to the First-tier Tribunal to be determined afresh.

15. For the respondent, Ms Blackburn resisted the appeal. She told us that the decision does not contain errors of law, material or otherwise. Relying on Abdi & Ors v Entry Clearance Officer [2023] EWCA Civ 1455, Ms Blackburn said that there is no general obligation on the tribunal to put to an appellant each and every matter on which it may rely when reaching its decision.

16. Drawing a distinction between questions of credibility and fairness, Ms Blackburn argued that the appeal before the First-tier Tribunal turned on credibility, and the Judge's assessment of each strand of evidence was fair. She said that the Judge was correct to find and rely on inconsistencies in evidence when assessing credibility. Ms Blackburn told us in this case there are no explanations for inconsistency, which the Judge could not ignore.

17. Ms Blackburn argued that the Judge did not rely on concealed matters which would come as a surprise to the appellant. Instead, the Judge considered the evidence which had been placed before him. That the Judge did not put a point to the appellant is irrelevant. The Judge considered the evidence laid before him on behalf of the appellant.

18. Ms Blackburn asked us to dismiss the appeal and allow the decision to stand.

Analysis

19. The judge writes a carefully worded decision in which it is clear he considers each strand of evidence. His conclusions are found in the subparagraphs of [17]. There, the Judge finds that there are inconsistencies in the evidence, that the appellant's claim lacks specification, and that there are difficulties in reconciling some of the evidence.

20. The Judge deals with the expert report relied on by the appellant at [17.4] of the decision. There, the Judge rejects the expert report because it is dated 18 April 2017, and so predates the appellant's appeal to the First-tier Tribunal in 2017. We have a copy of the First-tier Tribunal's decision promulgated on 13 July 2017. The expert's report did not feature in the 2017 appeal to the First-tier Tribunal.

21. The Judge starts [17.4] by attaching little weight to the expert report because of its date, and because the Judge has not been provided with all of the documents the expert had. Even though [17.4] is several sentences long, the Judge gives no other reason for rejecting the expert report. The expert report addresses the appellant's ethnicity and place of birth. That is not something that will have changed since 2017.

22. There is no meaningful analysis of the expert report. An expert report is a freestanding source of evidence which requires some Judicial analysis. An expert's opinion does not need to be accepted, but the Judge must give reasons for either accepting or rejecting expert witness evidence. Those reasons are not in the Judge's decision.

23. The respondent was not represented at the hearing before the Judge. Between [10] and [16] the Judge carefully analyses the evidence and finds inconsistency and implausibility. An argument that the appellant presented the evidence, and the Judge would have been wrong to ignore it is understandable, but the problem is that the Judge embarks on an exegesis of the evidence finding points against the appellant which the appellant has not had the opportunity to explain away.

24. The Surendran guidelines apply when the Home Office is not represented at a hearing. Among them are the following:

... Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto.

...There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance... Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise

these with the representative and invite submissions to be made in relation thereto.

25. In Koca v Secretary of State for the Home Department 2005 SC 487, the Inner House held that where a perceived inconsistency in the petitioner's position was to form a significant ground for rejecting his appeal, fairness required the adjudicator to give him an opportunity to explain it, especially where the respondent was not represented.

26. The Judge did not follow the Surendran guidelines. That is a material error of law.

27. Because the decision is tainted by material errors of law, we set it aside.

28. A fresh hearing in the First-tier Tribunal is necessary.

Remittal to First-Tier Tribunal

29. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

30. We have determined that the case should be remitted because the appellant was deprived of a fair hearing. A new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

31. We remit the matter to the First-tier Tribunal sitting at Glasgow to be heard before any First-tier Judge other than Judge Buchanan. A Bengali interpreter will be required.

Decision

The decision of the First-tier Tribunal errs materially in law.

The Judge's decision dated on 14 July 2021 is set aside.

The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle
Deputy Upper Tribunal Judge Doyle

Date 17 June 2024