IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20970/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2014	**On 13 November 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

BAGHDAD BOUCHETA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Saeed (Solicitor Advocate)
For the Respondent: Ms L Kenny (Counsel)

DECISION AND REASONS

1. This is an appeal against a determination by the First-tier Tribunal, (Judge J C Hamilton) promulgated on 13 August 2014 dismissing the appellant's appeal against the Secretary of State's decision to set removal directions, having refused him leave to remain on the basis that he had completed a period of 14 years' continuous residence.

2. Although Mr Saeed, who represents the appellant before us today, has formally adopted the other three grounds of appeal, the main focus has been upon ground 1, which is that the determination of the First-tier Tribunal is unsafe because it was submitted more than three months after the date of the hearing of the appeal. In fact it was promulgated three months and nine days after the hearing of the appeal. There is no evidence before us to suggest that the delay in its promulgation was due to any administrative error.

3. Our attention has been drawn by Mr Saeed to the helpful guidance relating to the three month rule in the case of **Sambasivan v Secretary of State for the Home Department [1999] EWCA Civ 04194**. That case involved a somewhat longer delay than in the present case. Potter LJ, giving the judgment of the Court of Appeal, said this at [15]:

> "In cases of delay of this kind the matter is best approached from the starting point that where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittance for rehearing unless by reason of particular circumstances it is clear that the eventual outcome of the application, whether by the same or a different route, must be the same."

4. A little earlier in the judgment Potter LJ gave two reasons for that approach. First, he said that any substantial delay between the hearing and preparation of the determination renders the assessment of credibility issues unsafe. Secondly, such a delay tends to undermine the loser's confidence in the correctness of the decision once delivered.

5. We have to bear in mind the guidance that has been given by the Court of Appeal, and the justification for it, and we approach this appeal accordingly. Therefore the starting point is that the delay of over three months will merit remittance for rehearing regardless of any other grounds, unless there is justification for departing from that position because, by reason of the particular circumstances of the case, it is clear that the eventual outcome would be the same irrespective of the delay.

6. It is plain that in the underlying appeal, the credibility of the appellant and of his two witnesses was a matter of central importance. In a determination running to some 50 paragraphs, the First-tier Tribunal set out a very detailed account of the oral evidence given by the appellant and by the two witnesses he called in support of his appeal. The Tribunal has also described in considerable detail the arguments that were put before it on both sides. Essentially the Tribunal found that the appellant had failed to establish, on the balance of probabilities, that he had in fact been in the UK for the length of time that he claimed he had:

> "Looking at the evidence as a whole, even allowing for the passage of time there was an enormous evidential gap in respect of the time that the appellant claimed to have been living in Manchester." ([42])

7. It had been the appellant's case that he arrived in the country illegally in around November 1997, and having met the two witnesses in London, he then moved to Manchester where he commenced his studies. He said that he was living either in Manchester or in Wigan in the period from 1997 to 2004. He claimed that he had embarked upon (and indeed completed) four courses of study during that period. The first was a language course, which he commenced on 1 January 1998. The second language course began sometime in 1998, and finished in February 1999. The third was a course that he is said to have started in around May 1999 and finished in November of that year, and the fourth an IT course which he claimed he began in January 2002.

8. It was also his evidence that from around the summer of 1998 he was working part-time in a coffee shop near to the college in Manchester. He worked there for a period of about two years (although he initially said in his evidence that that period was two months).

9. There was no evidence adduced by the appellant from anybody who knew him during the time that he claimed he was living in Manchester (or Wigan). He adduced no evidence from any friends he made while he was there; no evidence from his tutors, or from fellow students or co-workers; or from his employers. He produced no payslips in relation to his job at the coffee shop, but he explained that by saying that he was paid cash in hand and that he did not ask his employers to give evidence because he considered that they would be scared and refuse. The Tribunal interpreted that, fairly in our judgment, as meaning that they would not want to admit that they had been employing him off the books.

10. The adverse credibility findings made by the Tribunal depended upon a mixture of inconsistencies and inherent implausibility. One of the striking features of the case is that the Tribunal kept a very clear, detailed typed record of the evidence given at the hearing. There is a note of the questions that were asked not only by the parties' representatives, but also by the Tribunal itself (differentiating the latter by use of capital letters) and a note of the answers that were provided. A copy of that record was on the Tribunal file, and we provided an opportunity at the hearing of this appeal for both legal representatives to examine it and make submissions to us about it.

11. Despite Mr Saeed's attempts to persuade us otherwise, the determination is entirely consistent with that record and the evidence given by the appellant and his witnesses is accurately reflected in it.

12. A good example is paragraph [39] in which the Tribunal refers to striking inconsistencies between the appellant's evidence and that of his witnesses that raised significant concerns about the reliability of the appellant's account. It was the appellant's case that whilst he was in Manchester his brother (then in France) was sending him money. He said that it was £300 to £400 a month, and that the brother was not sending the money every month but just when the appellant asked for it. When he was asked "How did he send the money?" he referred to one of the

witnesses, a Mr Aouti, going twice to Manchester and bringing him the money. Otherwise the appellant said he went to London to collect it, every three months or so.

13. When Mr Aouti gave evidence, however, he said he had never been to Manchester. When he was asked if he ever gave money to the appellant, he said sometimes he gave him £20 to £30 to help him out. When he was asked "Did you give money from someone else?" he initially said he did not understand. When the Tribunal explained the question: "Did you ever get money for him from someone else that you then gave to him?" the answer was "no". All of this is recorded in the Tribunal's note and accurately reflected in the determination: paragraphs [18] and [24]-[25].

14. Moreover, it is obvious that at the time when the determination was made, the First-tier Tribunal still had a clear recollection of Mr Aouti's evidence, because paragraph [39] stated that the witness was "clearly completely baffled" by the suggestion that he had been giving the appellant money in this way. The Tribunal drew the following conclusion:

"I take into account that human memory is fragile, but this would seem to be something that the witness could reasonably be expected to have remembered if it had happened."

That is just one example of where the findings made in the determination are consistent with the recorded evidence. Although not every piece of evidence is referred to in the determination, there are no inconsistencies with the record and no crucial omissions.

15. One of the substantive grounds of appeal, besides the delay, is that the First-tier Tribunal made no finding as to the credibility of the appellant's witnesses and no findings at all regarding their evidence [Ground 3]. However, that complaint is unjustified. Paragraph [41] of the determination makes clear adverse findings in relation to the credibility of both the witnesses. It states that the evidence that they gave about the appellant's time in Manchester was "very vague" even though they both claimed to have been in regular and reasonably frequent contact with him during this time. They appeared to know nothing about his life in Manchester despite being put forward as his close friends who spoke to him frequently and who he visited regularly. They were unable to give any real detail about what he was doing in Manchester, or how he was living whilst he was there.

16. The record of the hearing kept by the Tribunal supports those findings. It appears that neither of the two witnesses had any knowledge that the appellant was living in Wigan, as he claimed. They also gave differing accounts of their contact with him whilst he was said to have been in Manchester. Mr Aouti said that he himself was studying and therefore telephonic contact with the appellant was only every three or four months or so. When he was asked what they spoke about, he replied "Mainly the trouble at home". When the other witness, Mr Bouchamia (with whom there was allegedly more frequent telephone contact, once or twice a week) was asked what

they were speaking about on the telephone he said "How is he progressing, what he is studying". He was then asked whether he knew what the appellant was studying and the answer was "No". As the Tribunal found in paragraph [41], that evidence seriously undermined the credibility of the witness. In fact the evidence of that witness that he never spoke to the appellant about where he was living, whether he was working or what he was studying during the whole of the period in which he was supposed to have been studying in Manchester, was patently incredible as the Tribunal found.

17. In the light of what is stated in paragraph [41] of the determination it is clear to us that the First-tier Tribunal was making adverse findings in relation to the credibility of both witnesses, findings which were open to it on the evidence before it. Given that there were specific adverse findings about their credibility in relation to the claim to have known that the appellant was in Manchester and what he was doing there, it can be inferred that their evidence in relation to knowing him at when he alleged he first arrived in London was equally undermined.

18. However, the most important point is that the evidence of the appellant himself was found to be incredible. There are good reasons for that, in the light of the record kept by the Tribunal. In paragraph [33] of the determination there is reference to the limited evidence produced by the appellant supporting his claim to have been studying in Manchester. He produced evidence that the college that he was said to have enrolled exists, and a letter that was said to have come from that college offering him a place on its English language course. The Tribunal made a comment that a photograph of the appellant was attached to that letter and it was not quite clear why the college would do that. There is also a comment about the fact that at the end of the letter, next to the asterisk, appear the words "Fee settled" which did not appear to relate to anything in the body of the letter.

19. However, it is clear that the First-tier Tribunal did not jump to adverse conclusions about the two features that it identified as being odd. That document and the virtually identical certificates relating to the appellant's claimed studies between 1998 and 2003 were described by the Tribunal as being consistent with his account, but equally consistent with an attempt to create the false impression that he was in Manchester between 1997 and 2003. Paragraph [33] ends with the sentence "I therefore have to assess the reliability of these documents in the light of the evidence as a whole".

20. Ground 4 of the appellant's grounds of appeal sought to castigate the findings in paragraph [33] as "perverse", but there is nothing perverse about them. The Tribunal has drawn attention to what it considered to be some slightly odd features in the documents relied on by the appellant, but it has not come to a conclusion that by reason of those features alone the documents are unreliable. Instead the Tribunal has taken the legitimate course of starting from the position that the documents are neutral, and reserving any decision as to whether or not the documents supported the appellant's claim until it has evaluated his evidence and indeed all the other evidence adduced by him.

21. Whilst the inference can be drawn that at the end of the day those documents were rejected as unreliable, the Tribunal was entitled to reach that conclusion in the light of the evidence as a whole. What was said about the documents in the passage complained of in no way amounted to a material error of law in the determination, Neither did the ultimate decision in paragraph [42] that in the light of the "enormous evidential gap" the appellant had failed to discharge the burden upon him of proving that he had been in the UK at the time he claimed to have been in Manchester. If the appellant and his two supporting witnesses were not believed, as they were not, then the documents relied could not outweigh their evidence so as to mandate a finding by the Tribunal that the appellant had proved that he was living in the UK for that long period of time on the balance of probabilities. On the contrary, the Tribunal had found, as it was entitled to, that the documents were consistent with the appellant seeking to create a false impression of his whereabouts between 1997 and 2003.

22. Taking all these matters into consideration and looking at the determination as a whole, we are satisfied that although there has been an unfortunate delay leading to the determination being promulgated some nine days later than the latest date on which it should have been in accordance with the normal rule, nevertheless, on application of the test set out in **Sambasivan** it is clear that the eventual outcome of the application would have been the same, and must be the same, regardless of the delay. The appellant's version of events was unreliable for all the reasons identified by the Tribunal in the determination, and further undermined by the inconsistent and inherently incredible evidence of his two witnesses, fatally for his appeal.

23. For that reason there is no substance in ground 1. We have already explained why grounds 3 and 4 have no merit.

24. The only ground remaining is Ground 2, which we can dispose of very shortly. It was suggested that the First-tier Tribunal took account irrelevant considerations in reaching its conclusions: the flaws in the evidence about the appellant's brother sending money to him were submitted to be an irrelevant consideration, and likewise the failure of the witnesses to know what he was doing in Manchester. However the account given by the appellant of his brother sending him money and by whom he was sending it, was plainly a matter of some importance relating to the credibility of the appellant and that of one of his witnesses; and if two people who claimed to have been in frequent contact with someone who was supposed to be studying in Manchester nevertheless knew nothing about what he was doing there, that plainly calls into question the veracity of the whole of the their evidence. Therefore the Tribunal, having formed the view that the appellant was not telling the truth about the money from his brother, was entitled to take that false account into consideration in assessing the credibility of his evidence as a whole and the same is true of the view formed about the witnesses and their evidence corroborating his claim to have been in Manchester at the relevant time. There was no error of law on this ground either.

25. In conclusion, we return to the two policy considerations behind the general rule that a three month delay will render a determination unsafe. The first relates to the

reliability of the Tribunal's assessment of credibility. In the present case, where the assessment of credibility was plainly made on the basis of a strong and accurate contemporaneous record of the evidence by a Tribunal that obviously had a clear recollection of it, and where demeanour appears to have played very little part in the assessment, that concern is assuaged. Moreover it is clear from an evaluation of the evidence that the appellant and his witnesses gave, as noted on the contemporaneous record, that their accounts were contradictory and inherently unreliable, and any Tribunal would have reached the same conclusion.

26. The second concern is the public policy consideration that such delay tends to undermine the loser's confidence in the correctness of the decision once delivered. However, any such concern can easily be assuaged in the present case. The fact that the determination is entirely consistent with the detailed contemporaneous notes taken by the Tribunal at the time of the hearing makes it clear to us that confidence can be placed in the correctness of the decision that was delivered.

27. For those reasons we consider that the First-tier Tribunal did not make a material error of law on any of the grounds stated in the Notice of Appeal. Thus despite Mr Saeed's best efforts to persuade us otherwise, we dismiss the appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Mrs Justice Andrews **13 November 2014**

No fee was payable and so there can be no fee award.

Signed Date

Mrs Justice Andrews **13 November 2014**