Upper Tribunal
(Immigration and Asylum Chamber)

Elayi (fair hearing – appearance) [2016] UKUT 00508 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Given orally on 05 October 2016 and promulgated on 15 November 2016**
On 05 October 2016	

Before

The Hon. Mr Justice McCloskey, President
The Hon Mrs Justice Cheema-Grubb, sitting as a Judge of the Upper Tribunal

Between

THAJUDHEEN ELAYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Z Malik, of counsel, instructed by JS Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

Justice must not only be done but must manifestly be seen to be done.

DECISION

1. The decision on behalf of the Secretary of State giving rise to this appeal was made on 26 January 2015. By this decision the Secretary of State refused the application of the Appellant Thajudheen Elayi, a citizen of India

now aged 28 years, for leave to remain in the United Kingdom under Article 8 of the Human Rights Convention.

2. The Secretary of State's decision was made under the discrete regime of the Immigration Rules constituted by Appendix FM Section S-LTR, specifically Rule S-LTR.2.2. The decision letter recites evidence available to the Secretary of State that the Appellant had previously undergone an English language proficiency test. The letter continues stating that the organisation ETS had conducted a review of, *inter alia*, the Appellant's test. ETS, it is said, confirmed that the Appellant's test certificate had been "obtained through deception."

3. The date of the test is stated to be 19 October 2011. This is a reference to the first of the two dates upon which the Appellant evidently underwent the testing. The letter states that as a result of the information provided by ETS the Appellant's scores from that test had been "cancelled." Although the decision letter does not spell this out with absolute clarity it is tolerably clear, and we so hold, that the decision was made under paragraph 2.2(a) rather than (b) of paragraph S-LTR of Appendix FM of the Rules.

4. Thus, in summary, the basis of the decision was that the Appellant, in making his application for leave to remain, had relied on false information, representations or documents, namely his TOEIC proficiency certificates. We deduce from the evidence that the application in question was that dated 21 December 2011 when the Appellant submitted an application for leave to remain in the United Kingdom as a Tier 4 (General) Student.

5. We have concluded that this appeal succeeds on the following grounds. The first relates to the conduct of the hearing by the Judge at first instance. This conduct is described in the Appellant's further witness statement dated 08 September 2015 and specifically paragraph 2 thereof. In this document the Appellant describes conduct which may, uncontroversially, be described as unconventional and unorthodox. There is no dispute about what is recounted in this statement and indeed it is corroborated by the Appellant's spouse in her separate and further witness statement.

6. In summary, the Judge (a) engaged in a private conversation with the Appellant's representative (b) in the absence of the other party's representative (c) in the precincts of the court room (d) partly out of sight and earshot of the Appellant and his spouse (e) in a setting other than that of bench/bar (f) before the Appellant's hearing began (g) relating to the Appellant's case and, finally, (h) the contents whereof, other than a question about the Appellant's religious adherence, itself an improper enquiry made in this fashion, were not divulged to the Appellant.

7. The principles to be applied to these undisputed facts are well established. They are set out in *inter alia* the decision of this Tribunal in Alubankudi [2015] UKUT 542 (IAC). As that decision makes clear, appearances are of elevated importance in matters of this kind. The prism to be applied is

that of the hypothetical observer, formerly known as the officious bystander. We refer particularly to [14]:

> *"The interface between the judiciary and society is of greater importance nowadays than it has ever been. In both the conduct of hearings and the compilation of judgments, Judges must have their antennae tuned to the immediate and wider audiences. Judges must be alert to the sensitivities and perceptions of others. The interaction of most litigants with the judicial system is a transient one and it is of seminal importance that the fairness, impartiality and detached objectivity of the judicial office holder are manifest from beginning to end."*

8. We conclude without hesitation that the undisputed conduct of the Judge offends against the principles rehearsed in Alubankudi. It was manifestly not redeemed by the religious adherence issue raised by the Judge during the hearing. The appearance of fairness principle was very clearly contravened. The hypothetical observer would, in our judgement, be gravely disturbed by the events under scrutiny. The crucial elements of a due, orderly and impartial judicial process were all lacking.

9. There is no scope in the present case for the view an unfair hearing having been found to have taken place this error of law may be immaterial, as other judgements of this Tribunal make clear. See in particular MM v SSHD [2014] UKUT 105 (IAC), at [14] – [18]. The issue is whether the hearing was fair. Once it is decided that the hearing was unfair the error of law is automatically a material one, unless the context is one of the greatest rarity. That also has consequences for the final order which we shall make. This is the first error of law which requires the determination of the First-tier Tribunal to be set aside.

10. The second error of law is also of an elementary kind and dimensions. In the Secretary of State's decision there was a failure to recognise that the conclusion that the Appellant's 2011 leave to remain application had contravened a provision of the Rules, namely a requirement of candour and honesty, did not lead inexorably to the further conclusion that the application had to be refused. Rather there was a discretion to be exercised. The terms of the decision letter make clear that the decision maker did not appreciate this. The rejection of the application was considered to be obligatory, a matter of course rather than a matter of discretion. The error of law committed by the Judge was to fail to recognise the presence of that error in the impugned decision.

11. This is entirely without prejudice to Mr Malik's separate argument relating to the construction of the Rule and in particular how one is to construe the terms "the applicant" and "the application". We do not need to determine that interesting argument in this particular case.

12. The third identifiable error of law in the Judge's determination relates to his treatment of the so-called "generic" evidence. This is identifiable in the penultimate sentence of paragraph 16 of the determination. There the Judge makes a rather bare and sweeping statement: "The Home Office

have access to all appropriate data and enquiries which were undertaken internally by ETS". We all know this to be manifestly unsustainable. This assessment is made irresistibly by virtue of this Tribunal's decision in the case of SM and Qadir [2016] UKUT 229 (IAC), at [63] especially, when the so-called "generic" evidence was examined in some detail giving rise to the findings rehearsed. It matters not that SM and Qadir post-dated the decision in the present case. The inexorable conclusion is that the Judge erred in law in this rather unparticularised and unreasoned statement in the determination.

13. Finally, we turn to the issue of materiality as regards the second and third errors of law which we have diagnosed. An error of law is material if its avoidance could have led to a different outcome. An appellate court or tribunal in applying this test must be confident that the outcome at first instance would have been unchanged had the error of law been avoided. We do not have that degree of confidence as regards either the second or third grounds upon which we have determined that the decision of the First-tier Tribunal must be set aside.

Notice of Decision

14. For the reasons given our order is as follows:

    (a) We set aside the decision of the First-tier Tribunal.

    (b) Having regard to the first ground upon which we have done so the Appellant was denied a fair hearing and that consideration per se makes it appropriate to remit the case to the First-tier Tribunal rather than to retain it in this forum for the purpose of a fresh hearing and decision.

    (c) Thirdly and finally we direct that the case be heard by a differently constituted First-tier Tribunal.

No anonymity direction is made.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 12 **October 2016**