IAC-BH-PMP-V2

Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/06881/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype for business	**Decision & Reasons Promulgated**
On the 16 April 2021	**On 29 April 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

O I D
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. C. Holmes, legal representative on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Jordan, appeals with permission against the decision of the First-tier Tribunal who dismissed his protection and human rights appeal in a decision promulgated on the 21 July 2019.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him and his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 16 April 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. The immigration history of the appellant is set out in the decision of the FtTJ. The appellant is a citizen of Jordan who arrived in the United Kingdom as a visitor in 2018, accompanied by his wife and daughter and made a claim for asylum on 20 December 2019.

5. The respondent refused his claim in a decision letter dated 5 July 2019.

6. The basis of his claim is that he became very close to a friend when growing up in Jordan and that they began a same-sex relationship which continued until they reached University. They were in a relationship for a significant period of time and this was a relationship that no one else knew of. However the appellant married and ended that sexual relationship after his marriage.

7. The appellant asserted that his bisexuality became known to his wife’s family as a result of the appellant having met with his former friend and that as a result he had been subjected to threats of harm. The appellant did not accept that the authorities in Jordan would protect him from his brother-in-law.

8. An additional basis of his claim was that he believed his daughter would be at risk of FGM.

9. The appellant appealed that decision to the FtT on the 28 August 2019. The FtTJ heard oral evidence from the appellant.

10. In a decision promulgated on 26 September 2019 the FtTJ dismissed his appeal. The FtTJ set out her analysis of the evidence and factual findings at paragraphs [40-56]. Whilst the judge accepted the

appellant's nationality and also accepted that the appellant had engaged in a same-sex relationship (see [45]), the judge did not accept any further part of the appellant's account as to how his meeting with T came to the attention of his wife and therefore other family members (at [41]) nor did the judge accept his evidence as to he was encountered in the hotel room with the man concerned (T). Further findings were made that the appellant's brother-in-law did not have the rank or influence to target the appellant upon return or in a place of internal relocation (at paragraph [48 – 49]).

11. The judge found that he had reconciled with his wife and that he would not have any future same-sex relationships (at [47)) and did not accept that the appellant had given a truthful account of being at risk of an honour crime carried out by his brother-in-law or that he would have the influence throughout Jordan. At paragraphs [54 – 55] the judge rejected the appellant's claim concerning FGM.

12. In conclusion the judge found that the appellant was not at risk of serious harm or persecution on return (at [55]). The FtTJ therefore dismissed his appeal.

13. Permission to appeal was sought based on the failure to take account of material evidence when reaching the credibility findings at [41] and allied to this, ground three that there was procedural unfairness relating to the transcription of the interview. A third ground (ground 2) related to the assessment of internal relocation.

14. Permission was refused by FtTJ Grant but on renewal was granted by UTJ Grubb on 7 February 2020.

<u>The hearing before the Upper Tribunal:</u>

15. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 16 November 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

16. Mr Holmes on behalf of the appellant relied upon the written grounds of appeal. There were also further written submissions.

17. There was no substantive Rule 24 response on behalf of the respondent save for a short submission provided at an early part of these proceedings.

18. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. I intend to consider

their respective submissions when addressing the grounds of challenge advanced on behalf of the appellant.

Decision on error of law:

19. There are 3 grounds advanced on behalf of the appellant. Dealing with grounds one and three taken together, the following matters are relied upon. Firstly the judge failed to have regard to material evidence and "proceeding under an inadvertent procedural unfairness" (I refer to the skeleton argument).

20. The material evidence that forms the focus of Mr Holmes' submission on ground one relates to the judge's assessment of how the appellant's wife became aware that he was engaged in an extramarital encounter thereby highlighting his bisexuality. It is the appellant's case that he came to the attention of his wife when she realised having seen a receipt from the shop where the appellant had purchase condoms.

21. The FtTJ considered the evidence at [41] of her decision:-

> "41. A further inconsistency was stated to be the issue of the receipt for a condom – again the use of the word inconsistency appears to be misapplied as the respondent refers to the fact that it is not believed that the appellant would be so careless about the receipt. The appellant did state question 98 of his substantive interview that he put the receipt inside the bag. He changed his evidence in a letter sent by his representative straight after the interview in which it was stated that the receipt was placed inside the bag and he did not see there is a receipt or see the shopkeeper place it in the bag. The appellant views this as an interpreting error. I note that the appellant did attempt to rectify this area at the earliest opportunity available to him and prior to the reasons for refusal being issued. It is however quite a different version of the information given at the interview."

22. However whilst the FtTJ referred to question 98, the FtTJ did not refer to or take account of the later answers recorded in the interview questions 100 and 101. At question 100, the reply given by the appellant was referring to the shopkeeper putting the receipt in the bag and at question 101, the appellant's response was consistent with the account given by the judge.

23. Thus it is submitted that before reaching the conclusion that the appellant's evidence was inconsistent, the judge should have taken into account not only the corrections made after the interview which she referred to at paragraph [41] but the contemporaneous questions and answers in the subsequent interview questions. Mr Holmes therefore submits that taken together; the judge erred in not considering the entire responses before reaching a view of the appellant's credibility.

24. Therefore looking at paragraph 41, where the judge makes a finding of discrepant evidence and thereby undermining the appellant's credibility of his account was unfair to the appellant in the sense that the judge held evidence against the appellant which was unfair.

25. In my judgement ground 1 is made out. As set out above, whilst it is clear that the judge took into account that the appellant had sought to challenge the interview record in a letter sent by his representatives (see page 17 of the bundle) which was seven days after the interview, it was also necessary to take into account the later answers to questions in the interview which were consistent with his account.

26. Even if it could be said that question 98 and the version given there was a different version from that given at answer 101, ground 3 which deals with this issue demonstrates that the appellant's explanation for the discrepancy as being as a result of "interpreter error" is correct.

27. In my view ground one has been superseded by ground three where post hearing evidence has now been provided to the tribunal which on its face demonstrates that the interview record was wrongly transcribed. If that evidence is correct it is of no relevance that the judge failed to consider the question 98 in the context of the later two questions because if the interview record was incorrect the finding made was not a valid finding or one that was in accordance with the evidence.

28. I therefore turn my consideration to ground three. Following the hearing of the original refusal of permission further evidence was sought by way of an independent transcript of the asylum interview. The appellant's solicitors obtained the audio recording and it was placed before Mr Hassan. In his statement he sets out how he conducted the process of producing the transcript and that he listened to the Home Office questions, the translation by the interpreter and the answers from the client. He recorded each part in the transcript to ensure consistency as to what was said. He stated that "he interpreted every word from the audio which he stated, "formed a clear and true picture of the information provided by the interview." Annexed to the written statement is a translation of what Mr Hassan had heard from the audio tape.

29. In terms of evidence I enquired as to whether this was an agreed transcript. There then followed some discussion as to whether the documents had been seen by the respondent. Mr Diwnycz on behalf of the respondent did not have any of the documents following the grant of permission. Those had been provided to him by Mr Holmes at the outset of the case. He had the opportunity to read those documents and prepare them. After some further investigations Mr Holmes was able to inform the tribunal that a copy of the transcript of

the documents were served on the Home Office on 18 May 2020 and the email by which it was served. Mr Diwnycz later accepted that the email had been sent but it appeared to have remained in the inbox unread and un-actioned.

30. Having heard the explanation I am satisfied that the documents had been properly served on the respondent. No explanation is been provided as to why the documents are not accessed and the hearing has been listed for hearing since 16 March 2021. No application was made for an adjournment in any event.

31. As to its evidential value, no points have been taken by Mr Diwnycz as to the contents of the witness statement and the translation. I further take into account that the document sets out the qualifications of the interpreter, holding a level II community interpreter qualification and be qualified to interpret in Arabic and Kurdish. Whilst his primary and secondary education was undertaken in Iraq and in Arabic, he is fluent in understanding, reading, and writing Arabic.

32. Mr Diwnycz, in his submissions accepted the contents of that statement. Furthermore, his submission to the tribunal was that the fairness point that had been raised in behalf of the appellant was one with merit and that he would be "highly surprised if the decision reached by this tribunal was not to remit the appeal as a result of that unfairness".

33. I therefore proceed on the basis that I have no reason to believe that the evidence provided is in error or unworthy of weight. I therefore treat the translation as an accurate translation of the questions and answers given which form the basis of the procedural unfairness argument.

34. The copy sent to the tribunal was unclear as to what each section referred to. However, Mr Holmes helpfully took me through the document. The translation begins with question 98 and the interviewer's question, followed by the Arabic spoken by the appellant (as indicated by the written Arabic script). Then follows the record by Mr Hasan interpreting what the Home Office interpreter had said and then records the appellant's response. Underneath this is the translation that Mr Hassan has translated it which is relied upon to demonstrate the interpretation error.

35. The translation by Mr Hasan reads "my wife, when I bought the stuff in the suite, I bought condom, I put it in my pocket but I forgot the bill receipt inside the bag." In the statement made by Mr Hasan he makes reference to the problems and interpretation which he describes as "one crucial point about the interpretation of the Home Office interpreter". He identifies as follows "as interpreters, we are strictly expected use first person interpreting, because it is very confusing for all parties if second person interpreting is used. For example, if I say

"he said I will write to you" you cannot tell if he is going to write or he meant that I will write on behalf of him to you. Therefore, it is a must for interpreters to use first person only to avoid confusing people. This problem was evident in his case, as the interpreter in the interview said "he said he put the receipt in the bag" which is unclear whether it means (the male client says, the other male person put the receipt in the bag) or (the male client says that he himself at the receipt in the back).

36. Looking at the translation, I accept the submission made by Mr Holmes that the record as set out in the interview at question 98 is inaccurate and that the account given by the appellant in the interview at question 98 is set out in those terms had it been properly interpreted. Furthermore, it supports the appellant's account that there was an interpretation error which was an explanation which was discounted by the judge who went on to find that the appellant had not given a consistent account concerning the factual basis of his claim.

37. Consequently, I accept that it was a mistake of fact. As set out earlier, Mr Diwnycz in behalf of the respondent also accepted that this was a mistake of fact which undermines the fairness of the proceedings.

38. The existence of such a mistake of fact give rise to a procedural irregularity which leads to unfairness for the appellant. As set out in the decision of MM (unfairness: E & R) Sudan [2014] UKUT 00105, a successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Therefore, an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, is not considered, with resulting unfairness (E&R V SSHD [2004] EWCA Civ 49).

39. As Mr Holmes sets out, it was not the fault of the FtTJ who did not have the advantage of the evidence of Mr Hassan. However, as the decision in MM (as cited) sets out, in appeals where mistakes of fact have occurred in such a way, the criterion to be applied is not of reasonableness but the criterion to be applied on review or appeal is fairness (at [22]).

40. Whilst it is not necessary for the appellant to show fault on the part of any party to the proceedings, I have had to consider the materiality of the procedural unfairness. The decision in MM (as cited) helpfully refers to the authorities in this area. In particular, I take into account that the reviewing or appellate court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

41. In this context, I note that there were other credibility issues properly raised by the FtTJ in her decision. However, in exercising caution as I must, when findings of facts are made on a basis which then turn out

to be erroneous, I cannot discount the possibility that the other credibility findings made have not been tainted by the erroneous finding. That will not always be the case in every appeal and each appeal must be considered on its facts. However, in the light of the submissions made by Mr Diwnycz who was in agreement with the submissions of Mr Holmes as to the materiality of the error, on the facts of this particular case, I exercise caution and note that decisions on protection claims should be considered with anxious scrutiny. I am therefore satisfied that the procedural unfairness resulting from the mistake of fact demonstrates the decision should be set aside.

42. On that basis it is not necessary for me to consider ground to which relates to internal relocation, which will be relevant when the decision is remade.

43. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless 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."

44. In the light of the error of law being that of procedural irregularity, it falls within subparagraph (a) above therefore in my judgement the best course and consistent with the overriding objective is for it to be remitted to the First-tier Tribunal for a hearing. I do not preserve any factual findings. However, the appellant’s evidence is recorded in the decision still remains as a record of what had been said by the parties.

45. For those reasons, it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside and remitted to the FtT.

Notice of Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside and remitted to the FtT.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him and his family members. 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 Upper Tribunal Judge Reeds

Dated 21 April 2021