Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21474/2016

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 8th August 2018	**On 22nd August 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cleghorn, Counsel instructed on behalf of the Appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan.

Rule 14: 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 or any member of his family. This direction applies both to the Appellant and to the Respondent.

2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 17th July 2017, dismissed his appeal against the decision of the Respondent made on the 30th August 2016 to refuse his application for leave to remain.

3. Permission to appeal was refused by First-tier Tribunal but on renewal was granted by Upper Tribunal Judge Coker on the 15th February 2018.

4. The background to the appeal is set out in the decision letter and the determination at paragraphs 8-15. It can be summarised as follows. The Appellant entered the United Kingdom in 2011, having been granted leave to enter and remain until 14 July 2012 for the purposes of study. In 2012, he applied an extension of his leave until July 2014 and stated that he undertook the required English language test himself and denied using a proxy. He had been convicted of some offences in 2013 (paragraph 12). In or about April 2014 the Appellant met his wife and they began living together in June 2014. She had surgery in May 2015 to complete gender re-assignment and was thereafter nursed to recovery by the Appellant. She converted to Islam prior to the marriage which took place on 9 December 2014 and this was followed by a civil wedding on 17 March 2015.

5. He applied for further extension in June 2014 but never received notification of the outcome. He had received a letter from the Home Office in October 2014 stating that the application was still being considered. In November 2014 he spoke with a local Registrar of Births, Deaths and Marriage and on that occasion the Registrar telephoned the Home Office in his presence concerning his immigration status and they had confirmed that his application was still pending. He has never received a decision on that application. The judge found at [34] that he was satisfied that that application was never determined, whether by way of refusal otherwise. The judge found it as "significant" that the Respondent did not provide a date for the refusal of that application, let alone a copy of it and proof of posting to the Appellant's last known address. Thus he found that the Respondent had "failed to establish that the Appellant did not meet the immigration requirements when he made his current application."

6. The Appellant then made a further application for leave to remain on 15 September 2015 which resulted in the decision letter of 30 August 2016 and summarised in the determination of paragraphs 4 – 7 of the determination. The Respondent refused his application both under the Rules and outside of the Rules.

7. The Appellant sought permission to appeal and the appeal came before the First-tier Tribunal on the 6th July 2017. In a determination promulgated on the 17th July 2017 the Judge dismissed the appeal on human rights grounds (Article 8).

8. For reasons which shall become clear, it is not necessary for me to set out in detail the decision of the First-tier Tribunal on the basis that it is agreed between the parties that the Judge erred in law by the way in which the issue of the concession made by the Respondent was dealt with during the hearing. Whilst other issues were referred to in the grounds, Ms Cleghorn directed her submissions to the grounds where reference was made to the procedural irregularity in the context of the circumstances in which the concession was purportedly withdrawn.

9. In the grant of permission, Upper Tribunal Coker made a direction for witness statements from the advocates who had been before the FtT to be filed and in accordance with that direction two witnesses statements were filed by Counsel and one by the Presenting Officer concerned (not by the advocates before the Upper Tribunal). I was also able to hear from Mr Diwncyz who had access to the notes on the file and the ROP and from Ms Cleghorn, Counsel now instructed.

10. The issue in the appeal related to that of insurmountable obstacles to family life taking place in Pakistan in the context of the Appellant's British citizen wife who had undergone gender reassignment surgery. The Supreme Court considered insurmountable obstacles and Article 8 in the decision of R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11. At paragraph 43 the court considered the European jurisprudence and that the "wor.ds "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned". The Court also found that the requirement must be interpreted in a sensible and practical way and the definition in EX.2 was approved at paragraph [44] as follows:

> "The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

11. The Respondent's position was reflected in the decision letter which in turn was referred to by the judge at [24] in which he set out his reading of the decision letter and its contents. It is clear that this was done at the outset of the hearing as indicated at [24] and from the record of proceedings. The judge clearly indicated that on the reading of the decision letter the Respondent had accepted that there were insurmountable obstacles to family life continuing outside the UK and that the only issue outstanding was whether the Appellant's conduct, which had led him to fall foul of the suitability requirements, was of a "sufficiently grave nature" as to require the Appellant and his wife to live separate lives apart from each other in the UK and in Pakistan respectively. It is plain from that paragraph that the judge roundly rejected the analysis of the presenting officer which the judge found that to be "wholly incompatible with the passages of the refusal letter I have quoted at paragraphs 5 and 6". He went on to state "any lingering doubt that I may have had about this issue was dispelled when (Counsel) produced a Home Office document in which the decision-maker explained that he had not certified this case are suitable for certification under the non-suspense of appeal provisions of section 94 of the 2002 Act because he was satisfied that family life would be unable to continue in Pakistan."

12. As set out in the first witness statement of Counsel, the presenting officer was asked to confirm that and as the judge recorded, the presenting officer wanted to argue to the contrary. That is consistent with Counsel's witness statement at paragraph 3. It is clear that the judge considered that this amounted to a withdrawal of the concession which he had found had been made in very clear terms as set out in paragraph 24. The presenting officer in the witness statement he had provided could not recall the case

but attached short minutes; none of which referred to the issue of whether or not there was a concession which was withdrawn. Nor does it refer to any discussion as to an adjournment.

13. What occurred thereafter is not entirely clear from the witness statements that have been provided. I have not heard any evidence from the authors of those statements nor was the judge asked to provide any comment and for reasons that will become clear later on, it is not necessary for me to make any findings in this regard. The judge records that he enquired with Counsel as to whether or not an adjournment was necessary but recorded that she did not raise any specific objections and indicated that the Appellant wanted to proceed without delay which led to the judge at [26] considering that matters could be adequately addressed (although later at paragraphs 42 and 43 he made reference to the lack of background evidence in support). Counsel in the witness statement makes reference to having a conference only prior to the hearing and not thereafter. Mr Diwcynz was able to look at the written notes and confirmed that there was no reference to the hearing being stood down at any point.

14. It is accepted on behalf of the Respondent that in the context of an appeal such as this that if any concession made was to be withdrawn and which might require further evidence (as the judge made reference to at paragraphs 42 and 43) it would be procedurally unfair to continue without further time being given or for further evidence to be provided. Therefore the parties were in agreement as to the nature of the error of law on the basis of a procedural irregularity having taken place, however it had occurred.

15. However what became clear from the submissions of Mr Diwncyz, as to the remaking of the decision, was that there was a question mark as to whether the presenting officer had in fact withdrawn the concession identified by the judge. He informed the Tribunal that it was not formally withdrawn by the presenting officer and that it was raised as a preliminary issue but given the vagueness in which it was addressed, it could not have been said that this was a formal withdrawal of the concession. He states that if such a course was adopted it would require a formal withdrawal (usually but not always either prior to the hearing or at least in writing) at which point it would then trigger a response. This had not happened here and therefore it could not have been a withdrawal of the concession. That is consistent with Kalidas (agreed facts-best practice) [2012] UKUT 0032 where it was stated that the parties should assist the First-tier Tribunal at the CMRH to produce written confirmation of issues agreed or otherwise. He therefore accepted that the judge's consideration of this issue at [24] and in the light of his clear findings at [39] when seen in the context of the findings made concerning the suitability requirements, had the concession not been withdrawn or the judge being led to think that it had so been, the appeal would have been allowed.

16. Ms Cleghorn agreed with that and had provided a copy of the CPIN for Pakistan; sexual orientation and gender identity, which she submitted provided country information concerning the discrimination, intimidation and abuse faced by the transgender community. She submitted that it was this country information which had supported the Respondents concession. She further submitted that the Appellant had met the English language requirement, and there was a valid certificate to the

appropriate level within the new papers provided and the financial requirements are also met in the light of the Appellant's wife's income set out in the papers including P 60, payslips and employment contract and that in the light of paragraph [39] the appeal should be allowed.

17. Given the submission of the parties which are in agreement with each other that the correct outcome is for this appeal to be allowed I therefore make that order. It was open to the judge for the reasons given at [24] to reach the conclusion that the decision letter did accept that there were insurmountable obstacles of family life continuing outside of the UK and that the issue related to whether the Appellant's conduct was of a sufficient degree of gravity as to require the Appellant and his wife to live separate lives from each other. The judge had the opportunity of hearing the evidence from the Appellant as to that conduct and at paragraphs [32] and [33] found against the Appellant on both of those issues. However when looking at the issue of proportionality at [39] the judge stated that he wanted to make it clear that if he was determining the appeal on the basis adopted by the decision maker, that there were insurmountable obstacles to family life continuing in Pakistan, that he would have had "no hesitation holding that the Appellant's removal would be disproportionate." He went on to state "I would have so held notwithstanding the findings that I have made it paragraphs 32 and 33. In my judgement, it would have taken considerably more than failure to disclose three minor convictions and the use of an impersonator in an English language test, each of which occurred several years ago, in order to justify enforced family separation." He then went on to make reference to the public interest considerations. As Mr Diwncyz submits, any reference to a withdrawal of the concession was in error and had this error not occurred, the judge was unequivocal as to the proportionate outcome that he would have reached but for this error as set out above. This finding has not been challenged. Whilst the judge made a negative finding at [42] that was principally due to the lack of background country information concerning the government and societal attitudes towards the transgender community and this is because the case had proceeded on a different basis from that which was originally considered.

18. Given the strong finding made by the judge at [39] and the position adopted by the advocates, the appropriate and the just outcome is for the appeal to be allowed.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law; it is set aside and re-made and the appeal is allowed.

Signed SM Reeds

Date: 9th August 2018

Upper Tribunal Judge Reeds