Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09734/2019 (P)

THE IMMIGRATION ACTS

Determined without a hearing Pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated On 20 August 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MZ
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: written submissions provided by Iris Law
For the Respondent: written submissions provided by Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals on 19 March 2020 'Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal', and paragraphs 4 – 17 of the Presidential Guidance Note no 1 2020: Arrangements During the Covid-19 Pandemic, 23 March 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Hands (the judge) who, in a decision promulgated on 4 December 2019, dismissed his appeal against the respondent's decision dated 17 September 2019 to refuse his protection and human rights claim and his claim for humanitarian protection.

3. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal E.M. Simpson on 9 January 2020. The 'error of law' hearing was listed for 24 March 2020 but was vacated due to the Covid-19 pandemic. On 7 May 2020 the Upper Tribunal issued directions to the parties expressing its provisional view that, in light of the pandemic, it was appropriate to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing. On 21 May 2020 the Upper Tribunal received further submissions from the appellant in respect of the two questions. Submissions from the respondent, authored by Mr C Avery, were received by the Upper Tribunal on 5 June 2020. These submissions were late, but Mr Avery explained that they were caused by administrative difficulties in light of the pandemic. In these circumstances I consider it appropriate to extend time. On behalf of the respondent Mr Avery accepted that the judge failed to make key findings in respect of some key aspects of the case. He invited the Tribunal to set aside the judge's decision and indicated that, in light of the issues involved, a remote hearing would not be appropriate. Neither party made submissions in respect of the Upper Tribunal's provision view that questions (i) and (ii) could be appropriately and fairly determined without a hearing.

4. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature of the appellant's challenge to the judge's decision (which does not involve the need for further evidence to be considered), and having regard to the narrow focus of the legal challenge and the concise written submissions from both parties, and having satisfied itself that both parties have been given a fair opportunity to fully advance their cases, the Upper Tribunal considers it appropriate, in light of the Covid-19 pandemic, to determine questions (i) and (ii) without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

5. The appellant is a national of Afghanistan. He was 37 years old at the date of the First-tier Tribunal's decision. He entered the UK on 22 January 2009 with valid leave as a student, and this leave was extended to 31 May 2014. An application for further leave to remain based on his arranged marriage (to SH, a British citizen and the

appellant's 3rd cousin) was refused and the appeal dismissed. He became appeal rights exhausted on 29 February 2016. He claimed asylum on 26 August 2016 on the basis that he was at risk of persecution from SH's family (the appellant claimed he and SH separated in March 2015). The asylum claim was refused, and an appeal dismissed in a decision dated 5 April 2017. The First-tier Tribunal judge was not persuaded that the appellant gave a credible account of his claimed fear. Although the appellant sought permission to appeal his application was refused.

6. In further submissions the appellant claimed that he was bisexual and faced a well-founded fear of persecution in Afghanistan on account of his bisexuality. The respondent rejected the appellant's claim to be bisexual. The respondent noted the absence of evidence from Rami, the appellant's alleged partner, but acknowledged a statement from VK, a gay friend who used to live in the same accommodation as the appellant and who was subsequently granted asylum, maintaining that the appellant and Rami were in a relationship.

The decision of the First-tier Tribunal

7. The judge considered written and oral evidence from the appellant and VK. At [14] the judge noted the appellant's claim to be in a relationship with Rami but observed that there was no written statement or letter from Rami and that he did not attend the hearing. The judge rejected the appellant's explanation for the absence of evidence from Rami.

8. At [15] the judge summarised and considered the evidence from VK. VK claimed that it was evident to him and two other men living in the same accommodation that the appellant and Rami were gay men even though the appellant continued to deny the existence of any sexual relationship. In his oral evidence VK claimed he and the appellant had had sexual relations even though they were not a couple. The judge stated,

> "I am perplexed by the value of this evidence as, if the Appellant was so inclined to have sex with someone who is just a friend, then how genuine is his love for the person he claims to be devoted to and for whom he has great concern for his safety and well-being."

9. The judge placed little weight on a letter from an organisation named Rainbow Home and concluded, based on the appellant's lack of engagement with the LGBT community in the UK and his desire to present as a heterosexual male to his friends, the Muslim community and the community at large, that the appellant was not bisexual [19] and that he had fabricated his account to substantiate an unmeritorious asylum claim [28].

10. The judge considered (at [20] *et seq*), in the alternative, that even if the appellant was bisexual, he would choose to live discreetly and privately in Afghanistan because of social pressures and not because he would fear persecution. The judge reached this conclusion because the appellant had lived as a bisexual man in the UK in a discreet and private manner and had kept his sexual orientation a secret from the Muslim community in the UK and kept his relationship with Rami secret over several years ([24], [26], [27]).

11. In the remainder of his decision the judge considered that the appellant would not face a real risk of serious harm if he were returned to Kabul (he continued to have family living in Afghanistan) such as to engage Article 15(c) of the Qualification Directive. The appeal was dismissed on all grounds.

The challenge to the judge's decision

12. The grounds of appeal and the further written submissions contend that the judge conflated the issue of whether the appellant was in a serious relationship with the issue "whether he engages in relationships with men." There were said to be no findings in respect of the latter issue. If the appellant had engaged in sexual relations whilst in a relationship with another person, this would be a good reason for the non-attendance of his partner, and would also indicate that the appellant would be at risk on return to Afghanistan. The judge failed to make findings in respect of VK's evidence. If those who knew the appellant believed he was gay, then he may be perceived to be gay if he were returned to Afghanistan, and this would give rise to a real risk of persecution. VK commented on how the appellant was able to come to terms with his own sexual orientation, particularly in respect of his faith, and this evidence was relevant not only to whether the appellant identified as bisexual but also whether he would be perceived by others as being bisexual.

13. The respondent accepts that the judge materially erred in law in that he failed to make clear findings on some key aspects of the case.

Discussion

14. The suggestion in the grounds that the appellant's alleged sexual relationship with VK was the reason for the absence of his partner at the First-tier Tribunal hearing does not appear to have been advanced before the First-tier Tribunal judge. There is no indication that the appellant ever suggested that Rami failed to provide evidence because of the appellant's sexual indiscretion with VK. I reject this particular aspect of the grounds of appeal.

15. I am nevertheless satisfied that the judge failed to make clear findings in respect of VK's assertion that he and the appellant had had sexual relations. The fact that the appellant may have engaged in sexual relations with VK does not of course mean that he is gay or bisexual. It would be wrong to equate one's sexual activity with one's sexual orientation. But it nevertheless remains a relevant factor. The fact that the appellant may have been intimate with someone of the same sex is a factor supportive of his claimed sexual orientation and should have been considered in the round.

16. Nor did the judge make any specific findings or reach any conclusions in respect of VK's very detailed observations of the interaction between the appellant and Rami. For example, in his statement VK described how the appellant and Rami did most things together and that Rami stayed in the appellant's room most nights. There has been no assessment of this relatively significant assertion. Nor was there any assessment of VK's evidence regarding his view of the appellant's emotional interactions with Rami. Nor was there any assessment of VK's description of the appellant's reaction when he (VK) confronted the appellant about the nature of his relationship with Rami. Whilst the judge was not obliged to make specific findings in respect of all the evidence before him, he was obliged to engage with evidence that was clearly material to the issue he had to determine. Nor has the judge undertaken a clear assessment of VK's credibility as a witness. The judge noted that VK was firmly of the view that the appellant was gay but it is unclear whether the judge accepted that VK's view was genuinely held and, if so, there has been insufficient explanation as to why the judge rejected that genuinely held view.

17. The judge did however consider whether, in the alternative, the appellant would live discreetly for reasons other than a fear of ill-treatment even if he was bisexual. This brings to the fore the materiality of the judge's legal error. On the face of it the judge gave cogent reasons at [24] and [26] for concluding that the appellant's religiosity and his desire to maintain a respected position within the Muslim community would cause him to live discreetly as a bisexual man in Afghanistan, and not through a fear of persecution. I am however persuaded, albeit through the narrowest of margins, that the judge's error was material. This is because VK's evidence suggested that, regardless of whether the appellant would want to live as a bisexual man discreetly for reasons other than a fear of persecution, he may nevertheless be perceived by society as being gay or bisexual. VK described how the appellant and Rami were always together and that it was "obvious" they were in a romantic and sexual relationship. A judge would not of course be obliged to find that, if living in Afghanistan, the appellant's conduct would be such that he would be perceived to be gay or bisexual (the appellant had lived for many years without anyone suspecting his claimed sexual orientation), but this evidence nevertheless required exploration. On the basis of the evidence presented by the appellant I cannot say with

certainty that the judge's conclusion would have been the same even if he had properly explored VK's evidence.

18. In his written submissions Mr Avery submitted that the decision would need to be set aside and reheard. In my judgment the decision should be heard de novo in respect of all issues.

19. The appellant's representatives submitted that the case should be remitted back to the First-tier Tribunal to be determined afresh. The respondent did not consider it appropriate for the remade hearing to be conducted remotely and that a face-to-face hearing would be more appropriate. The respondent gave no indication as to whether the case should remain in the Upper Tribunal or be remitted. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 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.

20. I have determined that the judge's conclusions relating to the issue of the appellant' sexual orientation are unsafe. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. It will be for the First-tier Tribunal to determine the most appropriate mode of hearing the appeal.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Hands.

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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. Failure to comply with this direction could lead to contempt of court proceedings.

D.Blum

Signed

Upper Tribunal Judge Blum Date 16 August 2020