



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07016/2019 (P)

THE IMMIGRATION ACTS

**Determined without a hearing pursuant
to rule 34 of the Tribunal Procedure
(Upper Tribunal) Rules 2008**

**Decision & Reasons
Promulgated
On 24 September 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**SH
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Grounds of Appeal by Ms R Kotak, Counsel, instructed by JS Solicitors

For the Respondent: written submissions provided by Mr C Howells, 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: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19 March 2020, 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 Designated Judge of the First-tier Tribunal Manuell (the judge) who, in a decision promulgated on 24 October 2019, dismissed his appeal in respect of the respondent's decision dated 9 July 2019 to refuse the appellant's protection claim. The Grounds of Appeal contend that the judge acted in a procedurally unfair manner by failing to alert the appellant and his representative that it was not accepted that the appellant was too unwell to give evidence (as reflected in a psychiatric report) and to hold this against the appellant when assessing his credibility, when he stopped the appellant's representative from making submissions in response to the Presenting Officer's submissions as a preliminary issue that the psychiatric evidence was insufficient to show that this was the case.
3. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Lindsley in a decision dated 22 February 2020. Judge Lindsley directed that both the legal representative (Ms Kotak) and the Presenting Officer (Me Collins) should prepare sworn statements and to provide their contemporaneous records of the hearing. An 'error of law' hearing listed for 17 April 2020 was vacated due to the Covid-19 pandemic.
4. On 23 April 2020 Mr Justice Lane, President of the Upper Tribunal (IAC), issued directions to the parties. The directions expressed the President's 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.
5. On 14 May 2020 the Upper Tribunal received a joint application from the parties explaining that they had been unable to comply with Judge Lindsley's directions and requesting that the appeal be stayed until such time that Judge Lindsley's directions could be complied with.
6. On 22 June 2020 Upper Tribunal Judge Hanson directed that both parties were to file their statements no later than 4pm on 10 July 2020. This was also the deadline for the appellant to file any further submissions in respect of the two questions in paragraph 4 above. On 10 July 2020 the respondent filed and served a statement from the Presenting Officer and his contemporaneous record of the hearing. The appellant sought an extension of time due to the consequences of the pandemic and counsel's need to self-isolate and her inability to access her written contemporaneous record of the hearing. On 12

August 2020 Ms Kotak's statement dated 11 August 2020 and contemporaneous record of the First-tier Tribunal were filed and served.

7. On 20 August 2020 Mr Howells, Senior Presenting Officer, indicated that, in light of the signed statement dated 11 August 2020 and the first page of her contemporaneous handwritten record of proceedings, the respondent was prepared to accept that there was procedural unfairness at the hearing before the First-tier Tribunal, as claimed in the Grounds of Appeal. The respondent accepted that the unfairness constituted a material error of law and that the First-tier Tribunal decision could not stand. The Upper Tribunal was invited to set aside the First-tier Tribunal's decision and remit the appeal to the First-tier Tribunal for a *de novo* hearing.
8. 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, having regard to the statements and contemporaneous records now provided, does not involve the need for further evidence to be considered), and having regard to the relatively narrow focus of the legal challenge (relating to whether the judge acted in a procedurally unfair manner in respect of the absence of oral evidence from the appellant and the psychiatric report), and having regard to the Grounds of Appeal and the respondent's submissions dated 20 August 2020, and having satisfied itself that both parties have been given a fair opportunity of fully advancing 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

9. Given the joint position of the parties, with which this Tribunal agrees, it is not necessary to consider the appellant's circumstances in detail. He is a male national of Pakistan who was 35 years old at the date of the First-tier Tribunal decision. He arrived in the UK illegally on 24 September 2004 using false documents and claimed asylum on 18 April 2019. He claimed to be gay and to face a real risk of persecution in Pakistan if he lived openly as a gay man. The respondent did not accept that the appellant was gay.

The decision of the First-tier Tribunal

10. At the hearing the appellant relied on a psychiatric report from Dr Anshu Bohra, dated 25 September 2019. The appellant had been diagnosed with Mixed Anxiety and Depressive Disorder. The psychiatrist stated, "*Given his [the appellant's] current medical*

condition and psychiatric symptoms and cognitive function I do not feel he has capacity to give evidence in the First-tier Tribunal." At the start of the hearing the Presenting Officer raised, as a preliminary point, the appellant's fitness to give evidence. He argued that the psychiatric report was insufficient to show that the appellant was unfit to give evidence. According to the Grounds, supported by the first page of counsel's handwritten record of proceedings and her statement, and not challenged by the respondent, the judge intervened prior to the appellant's counsel responding and indicated his view that the psychiatrist was qualified to determine the appellant's fitness to give evidence. The judge stated that the Presenting Officer could make any submissions about the evidence at the end of the hearing. The Grounds of Appeal, supported by counsel's statement, contend that she assumed, by reason of the judge's intervention prior to her making submissions, that the judge accepted the psychiatric evidence. The appellant was not called to give evidence (although his cousin did give evidence).

11. The judge did not find the appellant had given a credible account of being gay. at [32] the judge stated,

The evidence for any lack of capacity in the Appellant, or any serious mental illness affecting his ability to give reliable evidence, was in the tribunal's view thin.

12. And at [33] the judge stated,

Notwithstanding that depression, the Appellant was able to attend his asylum interview (after 2 postponements), comment subsequently on the record of the asylum interview, instruct his solicitors and provide to witness statements. The Tribunal finds that the evidence is insufficient to show that the Appellant lacks capacity or was incapable of giving evidence at his hearing, with appropriate reasonable adjustments reflecting his vulnerable and depressed state of mind, in accordance with the tribunal's established guidance and the current Equal Treatment Bench Book. The tribunal draws an adverse inference from the Appellant's failure to have his evidence tested, and to address the numerous discrepancies in his evidence. After all, it was the Appellant who chose to make an asylum claim based on his sexual orientation and the burden of proof lay entirely on him.

13. Having gone on to consider and reject the appellant's account of his claimed discovery of his sexual orientation as incredible, and having regard to several inconsistencies and implausibility's in the appellant's evidence, the judge dismissed the appeal.

The challenge to the judge's decision

14. The grounds of appeal contend that the judge's intervention in respect of the preliminary issue raised by the Presenting Officer, created an assumption that the psychiatric evidence was accepted

and that it was not therefore necessary for the appellant to be called to give oral evidence. The judge's appearance appeared to the determine the issue of the appellant's capacity to give evidence in his favour. Had the judge raised his concerns at the beginning of the hearing the appellant could either have sought an adjournment to obtain further medical evidence or chosen to give evidence, despite his mental health issues. The judge's failure to raise these concerns at the commencement of the hearing amounted to procedural unfairness inflecting the entirety of his findings.

Discussion

15. The respondent accepts that the judge's decision is procedurally unfair. I have independently arrived at the same conclusion. I am persuaded that the particular circumstances of the judge's intervention, when the Presenting Officer raised the issue of the appellant's capacity to give evidence as a preliminary point, caused the appellant's counsel to believe that the judge accepted the psychiatrist's opinion that the appellant was incapable of giving evidence. This may not have been the judge's intention, but counsel's assumption, albeit wrong, was reasonable in all the circumstances. There is nothing in the documentation before me to suggest that the judge expressed any concerns with the psychiatrist's opinion regarding the appellant's capacity to give evidence during the hearing, or that he raised any such concerns with the appellant's counsel. Moreover, it is clear from the decision at [32] and [33] that the judge did draw an adverse inference from the appellant's failure to give oral evidence. Whilst the judge may well have been entitled to ultimately reject the psychiatrists opinion, it was incumbent on him to have made his view entirely clear so as to give the appellant the opportunity of choosing to give oral evidence or for further submissions or evidence to be provided. I am satisfied that the judge's failure to do so constituted, on the particular facts of this case, a procedural impropriety rendering the decision unsafe.
16. For the above reasons I am satisfied that the judge's decision is unsafe and must be set aside in its entirety. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a 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.

17. I have determined that the judge's conclusions relating to the issue of the appellant's credibility, based partly on the appellant's failure to give oral evidence, 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 Designated Judge of the First-tier Tribunal Manuell.

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: 22 September 2020