Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/08821/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P) **Decision & Reasons Promulgated**

On 17 August 2020 **On 20 August 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

A H

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation (by way of written submissions)

For the appellant: **Synergy Solicitors**

For the respondent: **Mr S Kotas, Senior Home Office Presenting Officer**

Background

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Gill on 21 February 2020 against the determination of First-tier Tribunal Judge T Jones, promulgated on 16 September 2019 following a hearing at Bradford on 9 September 2019.

2. The appellant is a Pakistani national born on 16 October 1976 who entered the UK as a fiancé in April 2002. Although an Islamic marriage was said to have taken place, the civil ceremony did not take place. It is said that this was because the appellant is gay although there is some conflict in the evidence as to how the bride came to know this and whether the decision not to marry was hers or the appellant's. In any event, she sought a divorce in 2004. There is no evidence before the Tribunal that it was granted.

3. The appellant did not embark and the day after his leave expired he made an application for indefinite leave to remain outside the rules which was refused in December 2002. Two weeks later he filed an appeal and this was dismissed on 30 July 2004 and he exhausted his appeal rights by 17 August 2004. The appellant still did not embark and eventually on 17 January 2011 he made another application for leave outside the rules which was refused with no right of appeal on 5 February 2011. It was reconsidered on 12 November 2011 but the decision was maintained. It may be that a right of appeal was given because the records shows that an appeal was lodged on 30 November 2011 but this was dismissed on 10 April 2012. He was then served with notification of his liability to removal. On 10 July 2012 he made a long residency application which was refused with no right of appeal on 6 August 2013. He challenged the decision by way of a judicial review on 4 December 2014 but this was refused on 3 July 2015. Permission to appeal that decision was refused on 12 August 2017 and again, following oral renewal, on 22 September 2017. Meanwhile, on 10 October 2016, he made an application for leave to remain on family and private life grounds which was refused on 5 October 2017. The current decision is dated 4 May 2019 and is in response to another application made on 5 August 2018. As the appellant raised a fear of return to Pakistan on account of his sexuality in his application, the respondent invited him to make an asylum application. This has not been done. None of the previous determinations have been adduced.

4. The appeal came before First-tier Tribunal Judge T Jones who dismissed the appeal.

5. The appellant sought permission to appeal on the basis that his claim had not been considered on humanitarian protection grounds and that his private life had not been fully assessed. It is maintained that the judge did not consider his long residence and his inability to return to Pakistan. His

application was refused by First-tier Tribunal Judge Welsh on 13 January 2020. She found that no humanitarian protection claim had been relied on and that although his homosexuality had been raised in his witness statement, his representative had specifically asked the judge not to make findings on that as confirmed by the judge's Record of Proceedings.

6. The appellant renewed his application to the Upper Tribunal and the application was granted by Upper Tribunal Judge Gill on 21 February 2020 who found that it was arguable that the sexuality aspect of the claim had not been withdrawn and that the judge had thus arguably failed to make findings on that.

Covid-19 crisis

7. Ordinarily, the appeal would have been listed for hearing following the grant of permission to appeal but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and directions were sent to the parties on 16 April 2020. The parties were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

8. The respondent replied on 23 May 2020.

9. Although the appellant appeared to be no longer represented by his solicitors at that stage, a response was, indeed, received from them and from Counsel who had represented him at the hearing. That appears to have been overlooked and on 15 June 2020 another set of directions was sent to his representatives along with the submissions received from the respondent. They replied with copies of the documents they had sent earlier. On the same date a letter was also sent direct to the appellant at his home address.

10. I now proceed to consider the matter. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "to enable the Upper Tribunal to deal with cases fairly and justly". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as

compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

11. I take into account that a full account of the facts are set out in the papers, that the arguments for and against the appellant have been clearly set out and that the parties have been given more than one opportunity to make any submissions they wished to and to raise any objections to the matter being dealt with on the papers. I am satisfied that the appellant has been able to participate in the process through his representatives and indeed that he has put forward further representations and documents in response to the directions issued. I note that he has not raised any objection to the matter being dealt with on the papers. I have regard to the importance of the matter to the appellant, to the length of time he has been here without leave making various applications to stay and consider that a speedy determination of this matter is in his best interests. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

12. The respondent's submissions were prepared on 23 May 2020 by Mr Kotas and were made without sight of the appellant's representative's reply.

13. Mr Kotas includes a note from the Presenting Officer who attended the hearing which confirms that Counsel specifically asked the judge not to make any findings on the appellant's sexuality when assessing paragraph 276ADE(1)(vi) as the appellant needed to seek asylum and that this advice was repeated to him by the judge. He submits that this is dispositive of the appeal. He points out that the appellant does not allege in his grounds that his counsel made submissions or a concession against his instructions and that his complaint now that the judge failed to make findings on an issue that he, through his representative, expressly told the judge he did not want him to make, was wholly untenable. It is submitted that if the Tribunal was not minded to accept this submission, then given the fact that the respondent was not in possession of all the papers and as the appellant appeared to be unrepresented, a hearing would be appropriate. The submissions point out that there may have been tactical reasons why the appellant did not wish the judge to make findings on his sexuality because given the absence of supporting evidence before the Tribunal this may have resulted in an adverse finding, including a rejection of his claim to be gay, which would have been a starting point for any future decision maker in protection claim.

14. The appellant's representatives have responded to directions with a bundle of documents which include a note from Counsel dated 14 May 2020, what is said to be the appellant's further submissions dated 14 May 2020 and a letter from his GP dated 9 March 2020. Counsel in his note

maintains that he has no record of the case on his laptop because of a technical error with his hard drive which resulted in a loss of data. From memory, he maintains that he would have argued that there would be very significant obstacles to reintegration impacting on his private life on return. He states there is little more that he can add in the circumstances.

15. The appellant's statement is essentially a shorter version of the statement submitted in support of his appeal to the Tribunal. He confirms that he was pressured into marriage by his family who believed that he would no longer be gay once he was married. When he told his future wife that he was unable to marry her she did not support him and this brought shame upon his family. He maintains that he has built a private life here and has many friends. It would be unreasonable for him to return to Pakistan as he no longer has contact with his family. He suffers from depression and the thought of returning to a life where he would have to suppress his sexuality causes him anxiety.

16. The note from his GP is almost identical to the earlier note before the judge. It confirms that the appellant has been registered at his practice since 2006, that he is depressed and on medication for his depression and that he depends on friends as he is unable to work here.

The legal framework

17. The judge properly took into account the rules and the tests to be applied at paragraphs 8 and 28 of his determination.

Discussion and Conclusions

18. I have considered all the evidence, the determination of the First-tier Tribunal Judge, the grounds for permission and the submissions of the parties.

19. This is a case which essentially rests on whether the appellant through his Counsel asked the judge not to make findings on his sexuality. If it is shown that he did so, then his complaint that the matter was not assessed is untenable. If he did not, then the judge has erred in not making findings on the matter.

20. It is unhelpful that there is no contemporaneous note from Counsel. His recollection that he would have argued the issue of very significant obstacles on return does not advance the appellant's case as the judge did indeed take that issue into account. What would have been helpful would have been Counsel's recollection on whether the issue of sexuality was specifically exempted from the judge's consideration on the appellant's instructions.

21. In the absence of Counsel's notes of proceeding, I have the judge's record and the record of the Presenting Officer. The latter agrees with the judge's contention that a finding on the appellant's sexuality was specifically not sought. There would be no reason for the PO to make such a note if such a request had not been made by Counsel. I note that when Upper Tribunal Judge Gill granted permission, she did not have this confirmation before her.

22. The judge's determination was prepared on the same date as the hearing (although promulgated a few days later). It is safe to assume that his recollection of the events of the hearing were, therefore, fresh in his mind and that the contents of paragraphs 23-24 are a correct record of what transpired at the hearing. The Record of Proceedings also confirm that only private life was to be relied on and that in his submissions Counsel did not rely on the appellant's sexuality as a matter for assessment. I am, therefore, satisfied having taken all the evidence of the hearing into account that it was Counsel's clear position that the sexuality aspect of the case had to be considered as part of a protection claim which the appellant would have to make and that the private life claim consisted of his length of residence, friendships, and reasonable command of English even though he had used an interpreter. No submission was made that the appellant's sexuality would impact upon his ability to reintegrate on return. As pointed out by Mr Kotas, there was a dearth of supporting evidence as to the appellant's sexuality (indeed an absence of any evidence relating to the appellant's private life) and the appellant may have been tactically avoiding a finding which would place him at a disadvantage when his protection claim was considered.

23. There was no humanitarian protection claim argued or indeed made and so the judge did not err in failing to assess it.

24. The evidence before the judge on private life consisted essentially of the very brief oral evidence of the appellant and a statement from a friend who said the appellant had made a life for himself in the UK. There was no other evidence as to the nature of that life, his activities or how he had integrated into the community here. His doctor's note confirmed he was on medication for depression but there was no evidence before the judge to suggest that such medication would not be available in Pakistan. The judge considered that the appellant's residence had always been precarious/unlawful and that he could have no expectation of being permitted to stay on that basis. He had lived 25 years in Pakistan and remained familiar with the culture and language (as shown by his use of an interpreter and his involvement with Pakistani friends). Given the restrictions placed on the judge by the appellant and his representative and the lack of supporting evidence adduced, no other outcome was possible.

25. Accordingly, it was open to the judge to dismiss the appeal and his determination contains no errors of law.

26. It remains open to the appellant to make a claim for protection as he was advised to both by his Counsel and the judge. His claim of being gay and any fear he may have of return on that basis can then be properly assessed.

Decision

27. The decision of the First-tier Tribunal does not contain an error of law and it is upheld. The appeal is dismissed.

Anonymity

28. The First-tier Tribunal judge did not make an anonymity order but to protect the identity of the appellant in any future protection claim, and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order.

29. Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

R. Kekić
Upper Tribunal Judge

Date: 17 August 2020