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

THE IMMIGRATION ACTS

Decision under Rule 34	**Decision & Reasons Promulgated**
On 8 July 2020	**On 21 July 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

O I D
(ANONYMITY DIRECTION CONFIRMED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Decision made under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Henderson ('the Judge') sent to the parties on 26 September 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.

2. By a decision dated 7 February 2020 Upper Tribunal Judge Grubb granted permission to the appellant to appeal on two of the three grounds advanced.

3. The appellant's legal representatives are Ashwood Solicitors, Manchester.

‘Rule 34’

4. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (‘the 2008 Rules’).

5. In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), I indicated by a Note and Directions sent to the parties on 11 May 2020 my provisional view that it would be appropriate to determine the following questions without a hearing:

   (i) Whether the making of the First-tier Tribunal’s decision involved the making of an error of law, and if so

   (ii) Whether the decision should be set aside.

6. In reaching my provisional view I was mindful as to the circumstances when an oral hearing is to be held in order to comply with the common law duty of fairness and also as to when a decision may appropriately be made consequent to a paper consideration: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115.

7. I detailed at para. 3 of the Note and Directions:

> I observe the grounds of appeal drafted by Counsel. I further observe the grant of permission to appeal by UTJ Grubb who granted permission on grounds (i) and (iii) alone, both of which have been identified with clarity by counsel. I have in addition noted, as did UTJ Grubb, the transcription of the relevant interview questions and answers by Mr. Tariq Hassan.’

8. The parties were requested to inform the Tribunal if, despite the directions, a face-to-face hearing was required. The time limit for such objections has passed and neither party raised an objection to the Tribunal’s provisional view.

9. Neither party was required to file written submissions, the Tribunal having been provided with the appellant’s grounds of appeal and the respondent’s rule 24 response, authored by Ms. Isherwood, Senior Presenting Officer, dated 17 March 2020. The parties were permitted, if they so wished, to file written submissions. The time for filing such documents has expired and no written submissions were received by the Tribunal.

10. In the circumstances, and being mindful of the importance of these proceedings to the appellant and also to the overriding objective that the Tribunal deal with cases fairly and justly, I am satisfied that it is just and appropriate to proceed under rule 34.

Anonymity

11. The Judge issued an anonymity direction. No application was made by the parties to set aside this direction and I confirm that it remains in place.

12. The direction is confirmed at the conclusion of this decision.

Background

13. The appellant is a national of Jordan and presently aged 36. He arrived in this country as a visitor in 2018, accompanied by his wife and daughter. He claimed asylum two months later.

14. The basis of the claim is that consequent to the appellant's bisexuality becoming known to his wife's family, he has been subjected to threats and he is fearful that he will be killed by his brother-in-law or by the Jordanian authorities. His wife is aware of the appellant having had a same-sex relationship and continues to be in a relationship with him.

15. It is further asserted that the appellant's father wishes for the appellant's daughter to undergo FGM.

16. The respondent refused the appellant's application for international protection by means of a decision dated 5 July 2019.

Hearing Before the FtT

17. The appeal came before the Judge sitting at Bradford on 28 August 2019. The appellant attended and was represented.

18. The Judge addressed several inconsistencies identified by the respondent as arising in this matter. On occasion she found in favour of the appellant as to purported inconsistency in evidence, for example at [40] of the decision:

> 40. The appellant's identity and nationality are accepted. The appellant's bisexuality was not accepted primarily for several reasons – the first concerned the decision maker's view that [T's] response to the relationship ending was unemotional and inconsistent with the appellant's description of the length and genuine nature of the relationship. This is not an inconsistency and the decision maker has made an assumption about the reaction of [T] which does not take into account the circumstances of the appellant and the culture he and [T] lived in where such relationships face societal discrimination and possible violence and where there would appear to be a pressure to marry and have children and conform to religious and cultural norms. I accept that given the environment and culture that such a reaction is not 'inconsistent'. The respondent appears to be using the word

> inconsistent rather than stating that this is something which is not believed.

19. The Judge considered a further purported inconsistency in the appellant's evidence at [41]:

> 41. A further inconsistency was stated to be the issue of the receipt of 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 at question 98 of his substantive interview that he put the receipt inside the bag. He changed this 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 was a receipt or see the shopkeeper place it in the bag. The appellant views this as an interpreting error. I note the appellant did attempt to rectify this error 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.

20. The Judge accepted that the appellant had engaged in a same-sex relationship, at [45] of the decision, but did not accept that his wife has encountered him in a hotel room with 'T', at [46]. The Judge did not accept that the appellant's brother-in-law was of such military rank to enjoy sufficient influence as to be able to target the appellant if upon his return to the country the appellant internally relocated: [48]-[49]. Further, the Judge found that the brother-in-law was not responsible for the loss of the appellant's business in a Gulf state.

21. The Judge concluded as to the risk of persecution arising from the appellant's sexuality, at [47], [55]:

> 47. He is now reconciled with his wife and states that he will not have any future same sex relationships. He has stated that he does not wish to cause problems in his marriage. He is opting to live discreetly not because of social pressure but because of his personal commitment to his wife.
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> ...
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> 55. I do not accept the appellant has been truthful in his account of his brother-in-law seeking to carry out an honour crime against him or that his brother-in-law has the weight or influence to pursue him throughout Jordan ...

22. As to the appellant's claim concerning FGM and his daughter, the Judge concluded, at [54]-[55]:

> 54. I do not accept that the appellant has been straightforward about the dangers of FGM to his daughter from his father. Even if the letters can be relied upon it is unclear why the appellant's father

> would be advancing FGM for his granddaughter given the claimed consequences for his daughter. The appellant and his wife are opposed to FGM and I do not accept that they would allow his father to carry out FGM. They have the option of internal relocation to avoid the appellant's father and the information provided by the respondent suggests that it is a criminal offence for a grandparent to remove a child from the person who is entitled to custody. The appellant does not appear to be suggesting that his father would abduct his child and I note that there would have been opportunities for him to have done so in the past after the appellant and his wife returned to Jordan. I also note that the appellant has stated that his father has not mentioned the issue for a period of five years after the birth of his child. I formed the impression that the appellant was simply adding an additional element to his asylum claim in an attempt to strengthen it.
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> 55. ... I do not accept that his child is at risk of FGM on her return to Jordan ...

Grounds of Appeal

23. The grounds of appeal were drafted by Mr. Holmes, Counsel, who represented the appellant before the First-tier Tribunal. The relevant grounds of appeal are

    (i) The FtT erred by failing to take account of material evidence

    (ii) …

    (iii) There was procedural unfairness

24. I observe that the appellant does not challenge the adverse judicial findings made in relation to the FGM claim.

25. In granting permission to appeal UTJ Grubb reasoned, *inter alia*:

> 2. Ground (i) (read with Ground (iii)) is arguable. It is arguable that the judge at [41] wrongly identified an inconsistency in the appellant's evidence (at Q98) given that it was corrected by the appellant's representatives immediately after the interview record became available and also in the light of the appellant's answer two questions later in the interview (Q100) which is more consistent with what he says he said. The independent transcription of the interview may be relevant on an *E & R* basis.
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> …
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> 4. For these reasons, permission is granted on grounds (i) and (iii) but refused on ground (ii).

26. The respondent filed a rule 24 response detailing, *inter alia*:

2. The respondent opposes the appellant's appeal. In summary, the respondent will submit, *inter alia*, that the judge of the First-tier Tribunal directed himself appropriately.

3. Given what is alleged in the grounds the SSHD is unable to comment until the independent transcript is available.

Decision on Error of Law

27. By means of his detailed grounds, dated 9 October 2019, Mr. Holmes addresses ground 1 - a failure to take account of material evidence – and observes that though the Judge notes at [41] that the appellant sought to correct the written interview record soon after the conclusion of the interview, the Judge did not take into account the substance of the appellant's response two questions later. The relevant questions and answers in interview of 10 April 2019 are:

> Q 98. Can you continue to tell me what happened with your wife?
>
> A. We bought the sweets for my daughter and with the sweets I bought a condom but I forgot completely and put the receipt inside the bag. When I dropped off my wife she found the receipt and she just wanted to check the prices because we live in the [Gulf state] and she found that I bought a condom as well. She got crazy. As she got the key for the hotel, she came back on her mind that I have a relation with a girl. But when she came and opened the door and found us together she was completely numbed.
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> ...
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> Q100. Can you help me understand if you were so careful to be discreet and put the condom in your pocket, why did you not put the receipt in your pocket too?
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> A. I wasn't applying enough attention and the person at the counter, he put it in the bag.
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> Q101. Knowing that you were taking a risk meeting [T], did you not think to hide the receipt too, to avoid being discovered?
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> A. I haven't seen the receipt until she forgive me and she told me that she found it, my wife. She told me that after she give me. I ask her why did you come back and I saw that you are meeting a girl.

28. By a letter to the respondent dated 17 April 2019, the appellant's solicitors detailed corrections to the interview, including:

> Q96. Client states I bought the sweets not we bought the sweets. The receipt was placed in the bag, by the shopkeeper not the client.

29. Mr. Holmes details at paras. 7-9 of the original grounds of appeal:

> 7. The appellant would respectfully contend that before concluding that his evidence was inconsistent, the Judge was bound not only to take account [of] the corrections made after the interview, but also his virtually contemporaneous correction in answer to a subsequent interview question. The combination of the two suggests, rather powerfully, that the error in the record was not the appellant's, but either that of the interpreter attempting to capture the appellant's meaning, or more straightforwardly of the interviewing officer's fairly pressured summary of the responses.
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> 8. It must be borne in mind that asylum records are **not** verbatim transcripts. They are summaries of the questions and answer prepared *ad hoc* by the interviewing officer on a laptop under time pressure. They are prone, therefore, to error, and it is reasonably likely in any given case that there will be errors on the face of the record.
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> 9. The likelihood of this needs to be assessed in light of the record as a whole, and in particular, all of the elements of it which are, in fact, consistent with the account advanced by the appellant.

30. By means of amended grounds dated 23 December 2019, Mr. Holmes incorporated a third ground into the appellant's challenge, detailing at para. 6:

> 6. … the appellant submits that the decision of the Judge below is bad because, unbeknownst to the Judge, the evidence submitted by the respondent (the appellant's asylum interview record) was inaccurate and misleading, and did not faithfully record the responses given by the appellant to the questions asked of him during interview.

31. Mr. Holmes details, at paras 7-9, 13 of the amended grounds:

> 7. … In short, the recorded answers at questions 98-101 of the appellant's asylum interview are said to give rise to a discrepancy in the appellant's account. The appellant maintained before the Judge (and immediately following the interview when the record was corrected by way of correspondence) that the recorded answer at question 98 of the interview did not represent the answer given by the appellant. The Judge below, however, rejects this at paragraph 41 of her decision.
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> 8. This having been a live issue at the hearing before the Judge, the appellant has now obtained an independent transcript of the asylum interview, which was audio recorded. The content of this transcript, it is respectfully submitted, is mildly astonishing. Suffice to say, it demonstrates that both the answers relayed by the

> interpreter at interview, and indeed the written transcript prepared by the respondent itself, is seriously inaccurate and demonstrates that, in fact, the account given by the appellant at interview was wholly consistent, and that accordingly, he has wrongly been found to be 'inconsistent' by the Judge at paragraph 41 of her decision.
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> 9. This amounts to a mistake of fact, and a procedural irregularity, which has unfairly prejudiced the appellant. No fault can be ascribed to the Judge for this failing. Fault can, arguably, be ascribed to the respondent who, it is submitted, must be under a duty to ensure that its records of interview are accurate. Furthermore, the respondent is under a duty to ensure that their interpreters are properly skilled and interpret properly, in the first person. It is apparent from the transcript obtained by the appellant that, amongst other things, the interpreter in the present case addresses the appellant in the second person, rather than relaying, word for word, the questions put to him.
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> ...
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> 13. Accordingly, it is sufficient for the appellant to demonstrate that there has been a (at this stage an arguable) procedural unfairness resulting from a mistake of fact. The unfairness is all the more palpable when it results from evidence submitted by the opposing party which was inaccurate/misleading in content. In those circumstances, it presents a compelling case for a grant of permission to appeal, as it demonstrates that the appellant's evidence as to an interpreting error, rejected by the Judge below, was actually true.

32. I observe at this juncture the evidence of Mr. Hassan, an interpreter instructed by the appellant to consider a recording of the asylum interview and its attendant written record, as conveyed by means of an undated letter, where he details, *inter alia*:

> 'I was provided with the client's statement of evidence form (SEF) dated 10.04.2019 pages 10,11. I was instructed to review the questions and answers from Q98-102. I was also provided with the audio of the interview covering these questions.
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> ...
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> I would like to mention one crucial point about the interpretation of the Home Office interpreter. As interpreters, we are strictly expected to use 1st person interpreting, because it is very confusing for all parties if 2nd 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 1st person only to avoid confusing people. This problem was evidence in his case, as interpreter in the interview said "he said he put 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 put the receipt in the bag).

33. The appellant relies upon the decision in *MM (Unfairness: E & R) Sudan* [2014] UKUT 00105 (IAC); [2014] I.N.L.R. 576 where the Tribunal confirmed that an error of law can be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness.

34. Upon carefully considering the arguments advanced, and the documents relied upon, the difficulty for the appellant is that even if the submissions advanced at grounds 1 and 3 are taken at their highest the identified error of fact and law is not a material error.

35. I observe that the Judge accepted that the appellant had engaged in a relationship with 'T', at [45]. The present challenge concentrates upon the judicial assessment as to a purported inconsistency in interview concerning the commencement of a chain of events from his wife finding a receipt recording that he had purchased a condom, suggesting an extra-marital relationship, to her finding the appellant in a hotel room with his male lover. Taking the challenge at its highest, and accepting the Judge unwittingly erred in fact as to there being an inconsistency in the appellant's evidence because of an interpreting error in the interview transcript, at Q98, the Judge proceeded to give several other reasons for not finding the appellant credible on other aspects of this chain of events at [46] of the decision:

> 46. I have some concerns about the appellant's account of his wife returning to the hotel to find him with [T]. I question, for example, how he would explain that he was going to a hotel to see friends in the evening and why he would stay there when he was only half an hour where she was staying. I question how his wife would be able to walk straight into his hotel room when he was with [T].

36. The appellant does not challenge these adverse findings, which are not so intertwined with the finding of the receipt as to be infected by the erroneous finding of fact and procedural unfairness the appellant identifies at [41], if the present challenge were to be accepted at its highest.

37. Further, the Judge accepts that husband and wife are reconciled and, as observed at [48], the 'focus of the appellant's fear is now stated to be his brother-in-law'. There is no challenge to the finding at [48] that the brother-in-law holds the rank of lieutenant, which is 'not a rank which would normally be seen as a high rank or a powerful rank'. Nor is there a challenge to the finding at [49]:

> 49. The appellant has stated that his brother-in-law will carry out an honour crime against him. The evidence provided is insufficient to show the extent of the appellant's brother-in-law's influence and ability to carry out such a crime particularly if the appellant chose to move to another location in Jordan outside the city of Amman. There is a reference to corruption but not to the extent that a low-

> ranking officer would have the means or connections to trace the appellant from entry into Jordan or should he internally relocate.

38. The Judge ultimately made an adverse finding as to the appellant's account that his brother-in-law seeks to carry out an honour crime against him, see [55], which is not challenged by means of this appeal.

39. Further, in the alternative, the Judge concludes that the appellant can reasonably internally relocate: [48]. The appellant pursued a very narrow challenge to the internal relocation finding by means of ground 2, based upon a purported failure by the Judge to conduct a holistic and fact-sensitive consideration, which was appropriately found by UTJ Grubb to be unarguable. Consequently, there is no challenge to the internal relocation findings before this Tribunal.

40. I observe that there is no challenge to the Judge's finding at [50] that the loss of the appellant's business in a Gulf state was not connected to the brother-in-law contacting the appellant's former business partner.

41. The finding that the appellant does not possess a well-founded fear of persecution at the hands of his brother-in-law, a non-state agent, and the further finding that the brother-in-law does not possess the required influence to secure the assistance of the state authorities against the appellant upon his return are not challenged. Consequently, I conclude that even taking the present appeal at its highest, in relation to whether the appellant was consistent in his evidence as to how the receipt was placed in the bag, permission should not have been granted on grounds 1 and 3 where the appeal would fail regardless: *OK (Ukraine)* [2020] UKUT 00044 (IAC). The fear of persecution was considered in the alternative and there is no arguable challenge to the findings underpinning the reasonable availability of internal relocation from a non-state agent of persecution as found by the Judge in this matter. In all of the circumstances, this appeal must fail.

Notice of Decision

42. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

43. The decision of the First-tier Tribunal, dated 26 September 2019, is upheld and the appeal is dismissed.

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

44. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant, his wife and child. 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: D. O’Callaghan

Upper Tribunal Judge O’Callaghan

Dated: 8 July 2020

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed, and no fee award is payable.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan
Date: 8 July 2020