



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

Appeal Number: PA/01915/2018

THE IMMIGRATION ACTS

Heard at Field House

On 11 April 2019

**Decision & Reasons
Promulgated
On 15 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**AR
(ANONYMITY DIRECTION MADE)**

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iengar of Counsel instructed by Tower Hamlets Law Centre

For the Respondent: Mr S Kotas of the Specialist Appeals Team

Direction Regarding Anonymity - Rule 14 of 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. Failure to comply with this direction could lead to contempt of court proceedings.

ERROR OF LAW DECISION AND REASONS

The Appellant

1. The Appellant is a national of Pakistan whose date of birth is given as 01.01.1989. He is single and has no dependents. On 31 May 2011 he entered with leave as a Tier 4 (General) student which leave was extended to expire on 6 April 2014. He made an in-time application for further leave which on 3 June 2014 the Respondent (the SSHD) refused and certified because the Appellant was considered to have employed deception when taking a language test on 29 August 2012. Any right of appeal could be exercised only from outside the United Kingdom and the Appellant took no action on the decision.
2. On 24 June 2014 the Appellant was encountered by the authorities who proposed to remove him to Pakistan. Representations were made for the Appellant that his return to Pakistan would place the United Kingdom in breach of its obligations under the European Convention. The decision to reject these was certified and the Appellant's application made in September 2014 for permission for judicial review of the removal directions was refused.
3. On 4 August 2017 the Appellant claimed subsidiary protection because he feared persecution on return to Pakistan on account of his sexual orientation: he is gay.

The SSHD's decision

4. On 25 January 2018 the SSHD refused the claim for subsidiary protection. The SSHD did not believe the Appellant's account of his sexuality or of events which the Appellant claimed happened before he left Pakistan and since his arrival in the United Kingdom. The Appellant would not be at risk on return to Pakistan. There was insufficient evidence of private life in the United Kingdom to constitute exceptional circumstances warranting the grant of leave outside the Immigration Rules. The SSHD further noted the Appellant had not claimed subsidiary protection until almost 3 years after he had arrived in the United Kingdom and, relying on s.8 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the delay was considered to damage his credibility.
5. The SSHD went on to find that there were no exceptional or compassionate circumstances warranting a grant of leave to remain outside the Immigration Rules.

Proceedings in the First-tier Tribunal

6. On 8 February 2018 the Appellant lodged notice of appeal. The grounds relied only on his sexual orientation, the Refugee Convention and Articles 2 and 3 of the European Convention. By a decision promulgated on 15

March 2018 Judge of the First-tier Tribunal Nicholls made adverse credibility findings against the Appellant and his witnesses and dismissed the appeal on all grounds. On 10 April 2018 Judge of the First-tier Tribunal Kelly granted permission to appeal because it was arguable Judge Nicholls had erred by (1) drawing an adverse inference against the Appellant because he had not appealed the decision refusing him further leave as a Tier 4 (General) student migrant because of his use of deception in a language test and (2) had adopted a legally flawed approach to the testimony of the Appellant's witnesses.

7. By a decision promulgated on 19 June 2018 Deputy Upper Tribunal Judge Symes found that the Judge had erred in respect of the two matters identified in the grant of Permission to Appeal and remitted the appeal for hearing afresh in the First-tier Tribunal.
8. By a decision promulgated on 17 January 2019 Judge of the First-tier Tribunal Devittie dismissed the appeal on all grounds. On 11 February 2019 Judge of the First-tier Tribunal Saffer granted permission to appeal on the ground that the Judge had arguably erred in his treatment of the evidence of the Appellant's witnesses. In part the grant of permission was on much the same grounds as the grant of permission against the decision of Judge Nicholls.

The Upper Tribunal Proceedings

9. The Appellant attended the hearing but other than to confirm his address took no active part. Mr Kotas for the SSHD accepted it had not been fair to the Appellant that the material by way of previous decisions in relation to hearings at which the Appellant's witnesses had given evidence had not been disclosed before the hearing of the Appellant's own appeal. He also accepted that the Judge's presumption at paragraph 15.2.b on page 8 of his decision in respect of the credibility of one of the witnesses amounted to speculation. The presumption was that because one of the witnesses had appeared as a witness in three other appeals based on the applicant's sexual orientation, all of which been dismissed (albeit that one of the decisions had been found to contain an error of law and remitted to the First-tier Tribunal), the witness's evidence had not been believed in at least one of these hearings. Mr Kotas rightly made the point that the appeals might have been dismissed for reasons entirely unrelated to the evidence of the witness or his credibility. In these circumstances the SSHD would accept that the appeal should be remitted for hearing afresh in the First-tier Tribunal.
10. I noted that the appeal had been heard twice in the First-tier Tribunal and because of the need for certainty and finality, it might be appropriate for the appeal to be reheard in the Upper Tribunal. Ms Iengar countered that the central issue was the Appellant's credibility and so it would be more appropriate for the appeal to be remitted for a second time to the First-tier Tribunal. Mr Kotas voiced no objection and I enquired whether there

would be any objection if the matter were to be reserved to myself in the First-tier Tribunal. Both parties confirmed there was no objection.

Conclusion

11. I find that the two arguable errors of law identified in the grant of permission by Judge Saffer have been shown to be material, such that the decision of Judge Devittie should be and is set aside with no findings preserved. The appeal is remitted again to the First-tier Tribunal for hearing afresh in respect of which, subject to the views of the Resident Judge, the following directions are made.

Anonymity

12. An anonymity direction was made by the First-tier Tribunal. There was no request for the direction to be lifted and in the circumstances is continued until the next hearing when the parties should address the Tribunal whether it should be discontinued.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law is set aside.

The substantive appeal is remitted to the First-tier Tribunal for hearing afresh.

Anonymity direction continued.

DIRECTIONS

1. Consent is given to the citation and production of any unreported decisions of the First-tier Tribunal or the Upper Tribunal or both which relate to cases in which the Appellant or any of the witnesses he proposes calling have given evidence, whether on behalf of others or for themselves. The SSHD may find it necessary to redact names or other identifying details of individuals who are not witnesses for the Appellant.
2. The SSHD is to file and serve those decisions not later than two weeks before the next hearing.
3. The Appellant is to provide not later than two weeks before the next hearing the full names (including any aliases), Home Office reference numbers, if applicable, of all persons intended to be called as witnesses for the Appellant together with their current address and copies of their residential status documents.
4. The appeal should be listed before myself at an early date.
5. Urdu interpreter: 4 points.

Signed/Official Crest

Date 11. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal