Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05570/2019 (P)

THE IMMIGRATION ACTS

Decision under Rule 34
Without a hearing
On 18th May 2020

Determination Promulgated
On 27 May 2020

Before

UPPER TRIBUNAL JUDGE COKER

Between

AR
(anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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 in this determination identified as AR. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. FtT Judge Abdar dismissed AR's appeal against the refusal of his international protection and human rights claim for reasons set out in a decision promulgated on 22nd January 2020. Permission to appeal was granted by FtT Judge Chohan on 12th March 2020. Directions for the further conduct of the appeal were sent

on 20th April 2020 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside to be determined on the papers.

2. Both parties complied with the directions; the appellant sought an oral hearing in the absence, inter alia, of any indication from the Upper Tribunal of its view, there was no Rule 24 response from the respondent and the appellant had not seen the respondent's submissions, unless the Upper Tribunal was minded to set aside the decision for error of law without a hearing. The respondent's submissions were served upon the appellant and the Upper Tribunal on 11th May 2020. The appellant has not responded, as he was provided with the opportunity to, to those submissions. The appellant was, on the date of the making of this decision, aware of the respondent's position but has not chosen to respond or amend his submissions. No application to extend time to respond to the respondent's submissions has been made. The respondent has expressed her consent to the decision on error of law being taken on the papers.

3. I am satisfied that the submissions made on behalf of the appellant and the respondent together with the papers before me[1] are sufficient to enable me to be able to take a decision on whether there is an error of law in the decision of the FtT and if so whether the decision should be set aside, on the papers and without hearing oral submissions.

4. The appellant relied upon four grounds of appeal:

> Ground 1: that the FtT Judge failed to give sufficient weight to the witnesses' evidence;
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> Ground 2: failed to take into account that the appellate structure under which the previous appeal was determined was found to 'incorporate structural unfairness' and to be 'ultra vires';
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> Ground 3: the FtT Judge has discounted written evidence on the basis that it could be explained other than the appellant's honest account; the FtT Judge has reversed the standard (counsel presumably means the burden) of proof;
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> Ground 4: that the judge made unexplained findings.

5. Ground 1: the FtT judge did not doubt the sincerity of three of the witnesses who expressed their view that the appellant is gay but found their evidence unreliable although they may hold a genuine belief. The judge set out the evidence of the witnesses in detail. He addressed that evidence in the overall context including the time spent with the appellant. There is no contradiction in the judge concluding that the witnesses may have a genuinely held belief with that evidence being unreliable. In reaching a decision the judge took account of

[1] (a) the respondent's bundle; (b) the bundle filed on behalf of the appellant received by the Tribunal on 25th November 2019 and skeleton argument dated 27th November 2019; (c) the decision of FtT judge Abdar promulgated on 22nd January 2020; (d) The application for permission to appeal dated 14th February 2020 with grounds drafted by counsel A Briddock; and (e) the grant of permission to appeal dated 12th March 2020.

the evidence *as a whole* and given the circumstances of the witnesses' knowledge of the appellant it was a finding he was entitled to reach.

6. Ground 2: the appellant did not rely on this before the FtT. The FtT judge specifically raised the litigation in connection with Fast Track with the parties and was specifically informed that this was not relied upon. – see [20] and [35] FtT decision. It does not appear, and it is not asserted in the grounds or the appellant's submissions in this appeal, that there was such a submission. The grounds seeking permission to appeal assert that the Detention Action litigation should have been factored in by the FtT judge when considering the 'starting point' for consideration of the first appeal. The skeleton argument relied upon by the Appellant before the FtT states

> "6. The Appellant accepts that the findings of Judge Charlton-Brown are the starting point …
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> 7. Judge Charlton-Brown's findings re the asylum claim are at §7.1 - §7.11 of the determination. The tribunal is asked to note the reasons for not accepting the appellant is not gay are, to a large extent, based on minor discrepancies, subjective findings as to what would or would not have occurred, the late claim, and the appellant's immigration history. Although no attempt is made to undermine those findings, the Tribunal is asked to note the appellant was not in a relationship at that time and he had no witnesses.
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> …
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> 24. As above, the appellant accepts, as he must, that there is an undisturbed determination in which his sexuality was not accepted, and he was not believed.
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> 25. The appellant does not ask the Tribunal to go behind that determination in any way (as he cannot); however, as above the judge is asked to note that the reasons why the appellant was found not to be gay are largely based on perceptions of what would or would not have happened and small discrepancies."

7. The FtT judge set out in his decision how the guidance in Devaseelan impacted upon his decision making in the instant appeal. The judge identified evidence that could not have been before the first FtT judge and accepted that it had the capacity to permit him to depart from the first FtT decision. He set out in detail the evidence before him and, in the case of the person with whom the appellant claimed to be living, in the context of his appeal and the evidence that was before the judge that dismissed that appeal. The judge considered the fresh evidence in the context of the previous evidence. There is no merit in this ground of appeal – given the evidence before him and the previous decision in the appellant's immigration history, the judge reached his decision utilising the first appeal decision as the correct starting point – as was in fact submitted by the appellant's representative.

8. Ground 3: The judge identified in detail the evidence before him and acknowledged its consistency. But the judge considered that evidence, as he was required so to do, in the context of the evidence as a whole not merely as stand-alone evidence. The finding by the judge that the evidence was such as could exist between two people sharing accommodation as well as those who were cohabiting was a finding open to him. It was open to the judge to consider

that evidence overall. There has been no reversal of the standard or burden of proof. There is no error of law by the judge identified in Ground 3.

9. Ground 4: no further submissions were made by the appellant in support of this ground of appeal. It seems that complaint is made that the appellant is described as making "repeated" claims whereas he has not and that, combined with the lack of evidence of attempts to substantiate his first claim, were indicative of negative points against the appellant. The judge sets out the evidence relied upon by the appellant. Whilst the description of 'repeated claims' may not be totally accurate, the appellant has made two asylum claims, made a JR application and given evidence in an unsuccessful asylum appeal. the misdescription of this as 'repeated' has little or no bearing on the analysis by the judge of the evidence that was before him. The lack of evidence of attempts made to deal with the very clear adverse credibility issues raised in the previous decision and the respondent's decision were matters it was plainly open to the judge to comment upon; but again, they did not form a core basis of the decision and findings reached which were based solidly on the evidence before him.

10. There is no error of law by the FtT judge in his conclusions and findings that the appellant is not a gay man. The appeal is dismissed.

Conclusions:

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

I do not set aside the decision.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Jane Coker Date 18 May 2020

Upper Tribunal Judge Coker