Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: PA/01731/2016**

PA/01839/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 22 June 2017	**On 28 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

MR & ZA
[ANONYMITY DIRECTION MADE]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr K Lawson, instructed by Cohesion Legal Services Centre
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Ransley promulgated 21.11.16, dismissing their appeal against the decision of the Secretary of State, dated 2.2.16, to refuse their protection claims.

2. The Judge heard the appeal on 7.11.16.

3. First-tier Tribunal Judge Dineen refused permission to appeal on 13.1.17. However, when the application was renewed to the Upper Tribunal, Upper

Tribunal Judge Grubb granted permission on 8.3.17.

4. Thus the matter came before me on 22.6.17 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of the First-tier Tribunal should be set aside.

6. The First-tier Tribunal Judge made adverse credibility findings and did not accept the appellants' claim to be gay men and thus did not accept that there was any real risk of persecution or serious harm on return to Pakistan.

7. The grounds of application for permission challenge the credibility finding.

8. In granting permission to appeal, Judge Grubb found no basis for the claim that the judge applied the wrong standard of proof, or failed to properly deal with the deception issue, and thus refused permission on those grounds.

9. However, Judge Grubb found it arguable that the judge's assessment of the supporting witnesses' evidence was flawed, stating "It is arguably not a good reason to disbelieve them simply because their refugee status (as gay men) was granted by the Home Office without their veracity being tested in court."

10. Judge Grubb also found it arguable that the judge wrongly rejected the evidence of RB, in part, on a series of inconsistencies [50] which did not go to the substance of that witness' evidence.

11. At the hearing before me, Mr Lawson sought leave to pursue an additional ground of appeal, outside those permitted by Judge Grubb. In essence, this was to challenge the finding of the First-tier Tribunal at [62] that the second appellant gave contradictory evidence about an English language test. I refused permission to add this ground at this late stage as it was not pleaded in the application for permission. I note that the judge may have confused the issue of an English language certificate obtained by deception, which he said in evidence was 'genuine and not fake,' with what he said in interview about having been given a fake letter, which was not the test certificate but a CAS letter. He was not referring to the test certificate in interview. The appellant was thus not giving contradictory evidence, but the point carries little weight as it was clear that the judge found the appellants had practised deception in other ways in relation to their student applications.

12. However, in relation to the first ground granted permission to appeal, it appears from a reading of the decision between [54] and [58] that the First-tier Tribunal Judge may have discounted the evidence of the

appellant's three supporting witnesses primarily because they were granted refugee status without having to go through the appeal process and their claims of their own sexuality tested, as noted at [54].

13. At [55] the judge took into account that Mr RA's claim for asylum on the basis of his sexuality as a gay man has never been tested in a court. A similar point is made at [56] and again at [57] in relation to the other two witnesses.

14. A judge is entitled to reject or disbelieve such evidence, even if the witnesses are themselves genuinely gay, but cogent and defensible reasons for doing so must be provided in the decision. Further, a judge is also entitled to conclude that when the rest of the appellants' evidence was so lacking in credibility, taken in context of the whole, the evidence of the three witnesses did not outweigh the negative credibility findings. In effect, that is how the judge dealt in part with the evidence of the witness RA at [55] of the decision. Similarly, at [58] the judge gave cogent reasons for concluding that the witness NUD's evidence that he knew the appellant to be gay because of stereotypically gay mannerisms and gestures. However, at [57] the judge stated that Mr RB's evidence was "that because he is a gay man from Pakistan he recognised that Mr [MR] is gay. However, the credibility of Mr [RB]'s claim to be a gay man has not been tested in a court." No other reason has been given for rejecting this witness' evidence.

15. All three witnesses were present at court and adopted their witness statements as their respective evidence in chief. They were not cross-examined by the Home Office Presenting Officer, as stated at [8] that Mr Khan had no questions to ask them. It may have been difficult for the presenting officer to challenge their sexuality, given that they had each been accepted by the Secretary of State to be gay, but one might ask what more each witness could have done than present themselves as witnesses open to challenge in court. That their claimed sexuality had not previously been tested in court, is not an adequate reason, either in whole or part, to reject their evidence altogether.

16. Even if the fact that their respective claimed sexuality had never been tested in a court might have been a relevant factor in assessing credibility, it would have been insufficient alone to reject the evidence. The point has even less relevance when it is clear that evidence of these witnesses was open to challenge at the First-tier Tribunal appeal hearing as they presented themselves and gave oral evidence, adopting their witness statements. However, the presenting officer chose not to challenge their evidence, stating he had no questions to ask.

17. Whilst the judge stated at [53] that the credibility of the asylum claims had to be assessed by looking at all the evidence "in the round," and has set out details of their written statement accounts, it does appear that their evidence was accorded little weight primarily because their claims to be gay had not been tested in court. In the circumstances, this amounts to an error of law undermining the overall credibility assessment.

18. There is less merit in the criticism of the judge's treatment of RB, the final ground on which permission has been granted. The judge was entitled at [50] to point out a series of inconsistencies in the evidence as to when the appellant MR first met the minister. He gave different months and a peculiarly wide range of months, but under the pressure of cross-examination eventually plumped for August 2015. However, that was not possible since the minister was away on a sabbatical between May and September 2015.

19. Whilst the appellant's poor evidence on this point was highlighted by the judge, it was not an inconsistency of the minister, whose evidence was not challenged by any cross-examination by the presenting officer.

20. The judge discounted the weight to be given to the evidence of the minister, in the light of the appellant MR's inconstancies as to when he met the minister. However, this was not a criticism of the witness, but an assessment of the appellant's interaction with the minister. It is clear that the appellant Mr's account was not credible. The judge accepted that RB gave evidence in good faith, but was entitled to point out that the minister's believe that the appellants are gay men was largely due to what they had told him. In the circumstances, there is no merit in this ground of appeal.

21. It follows, for the reasons stated, that I have found such error of law in the making of the decision as to require the decision of the First-tier Tribunal to be set aside and remade.

Remittal

22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate the credibility findings and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
23. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Manchester;
2. The appeal is to be relisted at the first available date;
3. The appeal is to be decided afresh with no findings of fact preserved;
4. The ELH is 3 hours;
5. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Ransley;
6. An interpreter in Urdu will be required.
7. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did make an order. Given the circumstances, I continue anonymity order.

Fee Award Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup