



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

Appeal Number: PA/07021/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 12 July 2018**

**Decision and Reasons
Promulgated
On 15 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**A A
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr S Chelvan (for Duncan Lewis Solicitors)

For the Respondent:

Mr N Bramble (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of AA, a citizen of Bangladesh born 30 June 1989, against the decision of the First-tier Tribunal to dismiss his appeal on asylum grounds on 22 January 2018, itself brought against the decision of the Secretary of State of 7 July 2017 to refuse his asylum claim.

2. The Appellant's claim as summarised by the First-tier Tribunal is as follows. He had had a strict upbringing in Bangladesh and was sent to a Madrassa, where he was sexually abused. From puberty he began to develop feelings for other boys. Around the age of 15 he was caught kissing another boy by a classmate, who then complained to a teacher, who in turn reported the incident to his parents, who beat him. He was subsequently bullied at school. He left education soon afterwards, and kept a low profile until he left Bangladesh.
3. Following his arrival in the UK he began to express his sexual identity more openly, and created profiles on gay dating websites, and met a Hungarian male with whom he had a sexual relationship for some six months. He met another Bangladeshi man in Basingstoke and they stayed at each other's places. The relationship ended after six months. He met another man with whom he went on holiday to Cornwall; the relationship ended when that individual was removed from the UK. He had engaged with sexual activities with several individuals without any emotional involvement. He had always been open about his sexual orientation, in his dress, speech and demeanour.
4. The Appellant has pursued another asylum claim previously. On 28 September 2016 he had previously claimed asylum based on his family's affiliation with the Bangladesh National Party and the subsequent problems this caused him, combined with his atheism, embodied by having joined the Council of Ex-Muslims of Britain, and expressed via social media postings. That claim culminated with an adverse decision of the First-tier Tribunal of 10 January 2017 in which the Judge rejected his claim to have a profile as a prominent blogger and social media activist who might risk persecution for religious or other reasons in Bangladesh. The Upper Tribunal subsequently refused permission to appeal on 3 April 2017.
5. In evidence before the First-tier Tribunal in the instant proceedings the Appellant explained that he had felt uncomfortable talking about his sexuality during the earlier asylum claim.
6. That matter aside, the Appellant's immigration history as summarised by the Respondent is that he arrived in the UK on 8 September 2009 as a Tier 4 General Student. Events are then obscure though he made an application for leave to remain on 10 March 2013 which was refused on 14 May 2014. He was served with a notice of intention to remove him, though failed to report in line with the conditions imposed on him, and was arrested by an immigration enforcement team on 14 July 2016 whilst working at Spice Bank Restaurant.
7. Two factual witnesses supported the Appellant's claim below. Linda Piercy, a former colleague of the Appellant, had met him in 2011, and he had disclosed to her the fact that he was gay around 2012. She did not suggest she had met any of his claimed partners.

8. John Elworthy, a journalist, gave evidence, that he had known the Appellant since March 2014 when he met him at the restaurant where the latter worked. He had written about the Appellant's asylum claim and his gender preference, the Appellant's circumstances having first come to his attention when he witnessed him at first-hand being questioned by immigration officers who came to the restaurant. He was aware that the Secretary of State disbelieved the Appellant's proclaimed gender preference - but nevertheless his personal conviction was that the Appellant was speaking the truth, and that his claim to be gay was not simply not a peg of convenience on which to mount a claim for further leave to remain.
9. The First-tier Tribunal noted the Appellant's evidence that he had used his Facebook site to post comments about homosexuality, religion, human rights and other issues. It did not accept the Appellant as being gay, because
 - (a) Photographs said to show his effeminate personality appeared to be posed;
 - (b) The relative who had stood surety on his bail application had not given any evidence in support of his case; whilst he had mentioned in evidence that he had friends in the UK with whom he had discussed his sexuality, none of them had been called as witnesses, and nor had anyone who appeared in the various photographs he provided showing him at celebrations and events in clubs;
 - (c) The evidence of the cancellation of a booking reservation at a Cornwall hotel offered no ostensible support for his case, and nor did his membership of the BoyCrush dating site of which he had been a paying member during 2011: it was not a dating site;
 - (d) He had made no efforts to join or obtain support from a gay organisation in the UK;
 - (e) There was no evidence that his dating profiles had brought any same-sex encounters;
 - (f) His gender preference asylum claim was brought very late, after the exhaustion of a claim on other grounds.
10. In the light of these findings, there was no reason to consider the Appellant's sexuality would come to the attention of any potential antagonist such as to place him at real risk of harm: because he simply had not established himself as being a gay man.
11. Grounds of appeal submitted that the First-tier Tribunal had erred in law by
 - (a) Failing to assess the likelihood of the Appellant being perceived as a gay man given his social media profile;

- (b) Failing to assess the evidence from the supporting witnesses who had given oral evidence;
 - (c) Failing to have regard to the *Difference, Stigma, Shame, Harm* (“DSSH”) model which had been advanced as an appropriate reference point for the assessment of the Appellant's credibility, and which was consistent with the UNHCR position set out in their *Guidelines On International Protection No. 9*;
 - (d) Failing to appreciate that the Appellant had provided further evidence regarding his online profile, which in turn might create risks for him, notwithstanding his sexual identity;
 - (e) Holding the lateness of the Appellant's asylum claim against him notwithstanding the policy guidance found in relevant Home Office Guidance.
12. Permission to appeal was granted on 21 May 2018 by the Upper Tribunal, on the basis that all grounds were arguable.
13. Before me Mr Chelvan briefly elaborated on the grounds of appeal, emphasising that the DSSH model had received a degree of endorsement by the United Nations High Commissioner for Refugees (UNHCR). At my invitation, Mr Bramble intervened to express the view of the Secretary of State that the grounds had force, particularly in so far as no findings had been made on the witnesses who gave live evidence and on the possibility that the Appellant's online profile might create a perception that he was gay, whatever the underlying reality.
14. Both advocates joined in encouraging the Upper Tribunal to consider this case as potentially apt to go forward by determination by a legal panel, with a view to giving guidance on the timing of asylum claims based on sexual orientation generally, and to provide Country Guidelines for claims based on sexual and gender identity and expression for asylum seekers from Bangladesh.

Findings and reasons

15. It seems to me that the grounds of appeal have real force in this appeal, which it is convenient to address in an order slightly different to that taken in the grounds.
16. Firstly, there were independent witnesses who were able to give first-hand accounts of the manner in which the Appellant's sexual identity had come across to them. Given the First-tier Tribunal actively held the absence of

other sources of corroborative evidence against the Appellant, the evidence which tended to support his account demanded attention.

17. Secondly, the First-tier Tribunal held the delay in making his asylum claim against the Appellant when assessing his credibility. Doubtless that is a relevant consideration and indeed statute identifies it as such. However, there was no indication that the issues identified by the Home Office guidance as relevant to a delay in making such a claim had been given appropriate consideration. The Asylum Policy instruction *Sexual orientation in asylum claims* (Version 6.0) states:

“Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may have led some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon.”

18. That policy instruction also contains these further passages which are consistent with broader themes identified in the DSSH model:

“Stigmatisation, shame and secrecy

Some LGB people may originate from countries in which they are made to feel ashamed, humiliated and stigmatised due to their sexual orientation. This may be through homophobic attitudes, instilled within children in early years that being gay is shameful and wrong. This can be compounded where the individual is made to feel different and separated from their peers, causing such negative messages to become internalised. Claimants may reference in their narratives, elements of strong disapproval from external sources, indicating that the claimant’s sexual orientation and or conduct is seen to be unacceptable, immoral, sinful, and socially disgusting.

...

Responding to a claimant’s narrative: issues around ‘difference’

Most LGB asylum claimants live their lives in societies where being ‘straight’ is considered as the norm. From the perspective of the persecutor, the issue can be the fact that the individual is not conforming to common prevailing normative heterosexual stereotypes. In effect, the behaviour which may give rise to harm, harassment or persecution may not be LGB behaviour (or perceived LGB behaviour), but behaviour or lifestyles which are deemed not to be heterosexual enough.”

19. The UNHCR have also recognised these themes, in their *Guidelines On International Protection No. 9*

“Ascertaining the applicant’s LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant’s personal perceptions, feelings and experiences

of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices."

20. Thirdly, the Appellant clearly has a social media profile that indicates he is a gay man. His Facebook blogs include titles such as "homosexuality and Islam - what does the Quran actually say about gay people", "What it is like to be gay and Muslim"; his Facebook profile, which must be assessed in the context of him having 2,208 "friends" on the website, identifies him as being proud to be homosexual, to be actively interested in men, and records that he supports LGBT meetings. Clearly material of this nature could result in him being perceived as gay, whatever his true identity. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 at Reg 6(2) addressing the *Reasons for Persecution* state:

"In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution."

21. Furthermore, this intensity of self-expression generally supports the veracity of his claim to be a gay man. It seems to me that this aspect of the potential support it afforded the Appellant's claim should have received express consideration.
22. In the light of these flaws in the decision of the First-tier Tribunal, the appeal should be re-heard. There has been some delay in promulgating this decision whilst consideration was given to whether the case was suitable to go forwards as suitable for the giving of Country Guidelines. On reflection I do not consider that is appropriate: there are not clear findings of fact and given the significant failures of the First-tier Tribunal decision making first time round, I consider that the Appellant should enjoy the potential protection of a second tier of appeal once more.

Decision:

The decision of the First-tier Tribunal contains material errors of law. It is appropriate for the matter to be re-heard. The appeal is remitted for hearing afresh with no findings preserved.

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information

or matter likely to lead members of the public to be able to identify the Appellant.

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 8 October 2018