



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

Appeal Number: PA/08602/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2 November 2017**

**Decision & Reasons
Promulgated
On 18 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**P A D
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr, O Omoniruvbe of Church Street, Solicitors.
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

An order has been made under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified. Failure to comply with this order could lead to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 3 August 2016 refusing his claim for asylum.

Background.

2. The Appellant is a citizen of Nigeria born on [] 1982. He first entered the UK on 5 September 2008 as a student and subsequently extended his leave to remain in this category until 30 January 2013. On 11 February 2012 married a Ugandan citizen who is settled in the UK. Before the expiry of his leave to remain, they separated because he caught her being unfaithful with another man. He did not leave the UK because he hoped that there would be a reconciliation, which on his account there was. However, he did not apply for leave to remain as a spouse as his wife was not earning the minimum earnings required to meet the financial requirements of the Rules.
3. In September 2015, he found out that his wife was again cheating on him. The appellant was working as a toilet attendant and at work he met a man, CW, with whom he started a sexual relationship. This ended in January 2016 when CW became too possessive. Prior to this relationship, the appellant had never had any sexual feelings towards a man. He and his wife agreed to an open relationship and the appellant's evidence was that he had had numerous male sexual partners since meeting CW. However, his family had disowned because of his sexuality and he claimed asylum in February 2016 as he would be at risk of persecution on return to Nigeria because he wanted to live an openly bisexual life.
4. The respondent accepted the identity and nationality of the appellant but she was not satisfied that his account of becoming aware of his bisexuality was credible or that he had not been aware of the way in which bisexual and gay people were perceived and treated in Nigeria until November 2015.

The Hearing before the First-Tier Tribunal.

5. At the hearing before the First-tier Tribunal the appellant gave oral evidence as did a friend, Mr K. The judge did not find the appellant to be a credible witness and was not satisfied to the lower standard of proof that he was bisexual. She set out the reasons for this finding in [16]-[21] of her decision. At [16], she commented that the fact that Mr K had identified a different person in the photographs in the appellant's bundle as CW, the person identified by the appellant as awakening his bisexuality and with whom he had a six-month relationship, from the person identified by the appellant was highly damaging to the appellant's credibility, particularly as Mr K was a personal friend of CW. She found that there was no similarity between the men identified and that no plausible explanation was forward on behalf of the appellant to explain this.

6. At [17] the judge went on to say that she found that the absence of the appellant's wife as a witness cast further doubt on the credibility of the claim. She placed significant weight on the fact that the appellant's representative did not make an application for an adjournment to enable her to attend despite the appellant's evidence that she was willing to do so. It was submitted that her attendance was not necessary for the appeal to succeed but the judge found that her absence did affect her assessment of the credibility of the claim as their relationship was a key part of that claim. In [18]-[21] the judge gave further reasons why she did not find the appellant to be credible, his evasion of the issue of why he had not left the UK when his student visa expired, given that he had at that stage separated from his wife and had not discovered his bisexuality, his immigration history and the lack of plausibility in his account of realising he was bisexual and his inability to recall when he had told his family about this. For these reasons, the appeal was dismissed.

The Grounds and Submissions.

7. In the grounds of appeal, it is argued that the judge materially erred in [16] where she found that Mr K identified a different person in the photographs as CW. It is submitted that in fact he identified the same person as CW as the appellant but in a photograph where he was not in female make-up and dress. Secondly, it is argued that the judge erred at [17] by saying that the appellant and his wife's relationship was a key part of his claim when his asylum claim did not rely in any shape or form on his continued relationship with his spouse. Thirdly, it is argued that the judge erred in [18]-[19] by stating that the appellant's refusal to leave the UK after expiry of his student visa damaged his credibility and that the issue of delay did not apply in this case.
8. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on the basis that, given the importance attached to the issue of the photographs by the First-tier Tribunal, it was arguable that the two photographs were in fact the same man and so arguable that there had been some procedural unfairness in that an adverse inference had been drawn from the appellant's failure to provide a plausible explanation for the inconsistency when it had arisen during the evidence of the witness and he was not recalled or given an opportunity to address the Tribunal on the matter. The judge granting leave commented that the point about the appellant's partner had less merit as her evidence was obviously important but permission was granted on all grounds. In the light of the issues raised in the first ground and the potential relevance of the judge's record of proceedings to whether there was any procedural irregularity causing unfairness at the hearing, the record was photocopied and given to the representatives so that they had the opportunity of considering it.
9. Mr Omoniruvbe submitted that the photographs in issue (at pages 54 and 59 of the appellant's bundle) were in fact of the same person but in one photograph he was dressed as a woman and Mr K had not known him in

that role. The appellant had not been given the opportunity of being re-examined and he should have had a proper opportunity to address that issue. The judge had given undue weight to the absence of the appellant's wife and had failed to give proper weight to the fact that the appellant's evidence was consistent. Similarly, the judge had given undue weight to the delay in claiming asylum and had been wrong to reject as implausible his account of how he came to realise that he was bisexual.

10. Ms Fijiwala submitted that the grounds simply sought to reopen issues of fact. The fact remained that the appellant had identified CW in the photo at page 54 whereas Mr K identified him as the person in photograph at page 59. It was for the judge to decide what inferences could properly be drawn from that evidence. It was also for the judge to decide what inferences to draw from the fact that the appellant's wife had not given evidence and also from the factors she identified in [18]-[21].

Assessment of the Issues.

11. The first ground argues that in fact the appellant and Mr K identified the same person in the photographs and that in one photograph CW is dressed as a woman whereas in the other he is dressed as a man. It has not been argued that the claimed error of fact amounts to an error of law within the principles set out by Brooke LJ in R (Iran) v Secretary of State [2005] EWCA Civ982 at para 9(vii) (and more fully set out at paras 28-33) where there has been a mistake as to a material fact which can be established by objective and uncontentious evidence where the appellant and/or his advisors were not responsible for the mistake and when unfairness resulted from the fact that a mistake was made. There is no further evidence which can be regarded as objective and uncontentious to resolve the issue of whether the photographs are of the same person and, in any event, this was simply one of a number of issues relied on by the judge in rejecting the credibility of the appellant's evidence.
12. When granting permission to appeal, the judge identified as an arguable issue whether there had been some procedural unfairness arising from a lack of the opportunity of dealing with this issue which only arose during the evidence of the witness. It is clear from judge's record of proceedings that the issue of whether the two photographs showed the same person was raised during the cross examination of Mr K. He had identified CW as in photograph 59. It was put to him that the appellant had said it was CW in photograph 54 and he replied, "after dressing up". It was then put to him that he had identified someone different and he replied, "that's your opinion". The issue of the photographs was referred to, albeit briefly, in the submissions. On behalf of the respondent it was argued the Mr K had picked out the wrong person as the partner and on behalf of the appellant the submission is recorded as "witness picked diff. person - he said [CW] in two appearances".

13. Whilst the record of proceedings casts little light on the issue of whether it was the same or different people in the photographs, the record makes it clear that it became a live issue during the hearing. There was ample opportunity to apply for the appellant to be recalled for further evidence on this issue but no such application was made and both representatives made submissions on the issue. I am therefore not satisfied that there was any procedural irregularity causing unfairness. The issue of whether the photographs were of the same person and what, if any, inferences could be drawn from the evidence about who was in them were issues of fact for the judge to assess the light of the evidence as a whole.
14. I am also satisfied that the second ground arguing that the judge erred by drawing an adverse inference on the appellant's credibility from the fact that his wife did not give oral evidence has no substance, although the grounds put the matter more narrowly taking issue with the judge's finding or comment that the relationship was a key part of the claim. It is recorded at [11] that the judge was told that the appellant's wife had attended the hearing centre but left to go to hospital because she was experiencing stomach pains but no application was made for adjournment. I also note from the record of proceedings that during the appellant's oral evidence, when asked whether his wife had come to court, he replied yes. He said she had been taken ill. The judge asked him if he was happy for the case to go ahead without her and he replied that he was.
15. It was for the judge to decide what inference should be drawn from the fact that the appellant's wife had not given oral evidence. This was evidence that the appellant could reasonably be expected to produce. There is no substance in the assertion in the grounds that his asylum claim did not rely in any shape or form on his continued relationship with his spouse. The judge was entitled to regard their relationship as a key part of his claim in the light of his evidence that he and his wife had agreed to have an open relationship and to sleep with other people [6].
16. Finally, it is argued that the judge erred by taking account of the appellant's failure to leave after the expiry of his student visa in January 2013. However, that was a factor judge was entitled to consider. The appellant had been asked in cross-examination why he had not left the UK when his student visa expired, given that at that stage he was separated from his wife and had not discovered his bisexuality, but the appellant sought to evade the issue even though the presenting officer put the question several times and in different ways [18]. That was clearly an issue the judge was entitled to take into account. The grounds refer to the issue of delay but the judge made no error on this issue. She was entitled to assess the claim in the context of the appellant's immigration history.
17. Further, the judge was entitled to find that the appellant's account of realising that he was bisexual lacked plausibility when, on his own evidence, he was 33 years old, had never had any feelings for men but within one night after he met CW he realised he was bisexual. She was

also entitled to take into account the fact that he had not described any feelings of confusion or hesitation his full asylum interview but it was only in his oral evidence that he sought to add to his description of his feelings.

18. In summary, the grounds do not satisfy me that there has been any procedural irregularity causing unfairness or that the judge erred in law in her assessment of the evidence. She reached findings and conclusions properly open to her for the reasons she gave.

Decision.

19. The First-tier Tribunal did not err in law and its decision stands.
20. In the light of the issues raised in this asylum appeal, I am satisfied that this is a proper case for an order to be made under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and I make an order prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified.

Signed: H J E Latter

Dated: 17 January 2018

Deputy Upper Tribunal Judge Latter