



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11012/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 July 2018

Decision & Reasons Promulgated
On 13 July 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MI
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, Counsel instructed by Goldstein Immigration Law
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh. He was born on 8 September 1988. He arrived in the UK as a student on 19 November 2009. He was granted further leave as a student which expired on 28 June 2014. A further application for leave was refused

on 7 October 2014. He appealed against this decision. His appeal was dismissed on 18 September 2015. He became appeal rights exhausted on 16 May 2016. He made a claim for asylum on the basis of his sexuality on 27 May 2016. This application was refused by the Secretary of State in a decision dated 13 October 2017. The Appellant appealed. His appeal was dismissed by First-tier Tribunal Judge A M S Green in a decision promulgated on 19 December 2017, following a hearing at Taylor House on 27 November 2017. Both parties were represented at the hearing. The Appellant was granted permission to appeal against the decision of the FtT by Upper Tribunal Judge Blum on 21 March 2018.

2. The Appellant's claim is that he is gay. He was arrested and assaulted by the police in Bangladesh 6 July 2009 because of his sexuality. He was released two days later. The Appellant did not claim asylum when he first came to the UK because he did not know what it was. When he became aware of his right to make a claim two or three law firms refused to help him because they were Muslim. The Appellant fears return to Bangladesh where being gay is against the law and regarded as a sin.

The hearing before the FtT

3. The Appellant gave evidence at the hearing before the judge. He said he became aware about claiming asylum in 2011. He was told that his case would be put into the fast-track process and he would be detained. He was concerned that a decision would not be fair and he would be forced to return to Bangladesh. He claimed asylum in 2016, once the fast-track process was unlawful. His evidence was that he was not in a relationship. He had casual relationships via different social media networks. He described two sexual encounters that he had had with two men in the past six months. He produced a discharge certificate from the Lake View Hospital in Bangladesh to support his evidence that he had been ill-treated by the police in 2009. He was not able to explain why the discharge certificate showed an incorrect date of birth. The discharge summary suggested that the Appellant's injuries included an electric shock to his penis. He did not mention this in his asylum interview because he was embarrassed.
4. The judge heard oral evidence from AA. AA adopted his witness statement (p 41, AB) as evidence-in-chief. He came to the UK in 2014. His evidence was that that he was a close childhood friend of the Appellant, that the Appellant was arrested in mid-2009 at the same time AA discovered that the Appellant was gay. He gave evidence about the Appellant's family in Bangladesh. In oral evidence he stated that he met one of the Appellant's partners two months ago. He could not remember where they had met but he thought it was in Whitechapel, at a restaurant called Feast. He thought that he had met another of the Appellant's partners about a year ago in Tottenham Court Road at a gay bar. In cross-examination he was asked about the Appellant's partner at Feast and how he knew that he was the Appellant's partner. He said that the Appellant told him before the meeting.

5. There were before the judge affidavits from friends, S and SJA, of 15 November 2017. SJA's evidence was that he had known the Appellant since 2003. He said that that the Appellant was more interested in boys than girls at school. He was teased for being gay. He referred to the Appellant's arrest on 6 July 2009. His evidence was that he saw the Appellant at Dhaka Airport on 19 November 2009 when he was travelling to the UK for education and "to save his life". He recalled that the Appellant was in a very distressed state. His evidence was that he recalled telling the Appellant that he had nothing to fear about being gay in the UK. SJA has since completed his studies and returned to Bangladesh. He said that the Appellant's family are very rich. His family does not accept the Appellant because of his sexuality.

The Findings of the First-tier Tribunal

6. The judge's findings are contained within at [38] and [39]. They read as follows:

"38. Bearing in mind what I have said above and taking a holistic approach to all the evidence, I accept, on the objective evidence provided, that homosexuality is illegal in Bangladesh and carries severe penalties. It is also contrary to the sharia and there is evidence of persecution of gay men in that country by the state and members of the community. However, I do not accept the Appellant has established that he is a gay man, that he was arrested, detained and beaten by the police because of his sexuality and that he is of interest to the Bangladeshi authorities. I did not find the Appellant credible for the following reasons:

- (i) At the heart of his claim is his arrest, detention and beating between 6-8 July 2009 because he is gay. This alleged incident occurred eight years ago. He claims that he was released by the police without charge but has failed to provide a plausible explanation why. Either he was not arrested or if he was, it was for some other reason and had nothing to do with his sexual orientation. On the hypothesis that he was arrested, I do not think that he is of any interest to the authorities. His immigration history, which is narrated in the decision letter, states that he arrived in the United Kingdom on 19 November 2009 by plane from Bangladesh via Abu Dhabi on a student visa. The refusal letter and the Asylum Interview Record indicates that he travelled to this country on his own passport and the Home Office has his passport. How could he have travelled on his own passport from Bangladesh if he was a person of interest to the authorities who allegedly committed a serious criminal offence but carries the maximum jail sentence of ten years? If he was of interest, he would have been detained at the airport. Instead, he passed through without incident. His friend was at the airport with him at the time, by coincidence, and says nothing about trouble with the authorities at the airport. Furthermore, I am reminded that in Fatih Andic [2004] EWCA Civ 557 the Court of Appeal said it was no flaw of reasoning to conclude from the fact that

the Appellant has been released without charge after each detention that authorities had no further interest in him. If the Appellant was arrested and detained regarding a serious criminal offence, as he claims, the fact that he was released without charge makes it reasonable to conclude that the Bangladeshi authorities had no interest in the Appellant.

- (ii) The Appellant has exhibited two affidavits in support of his claim from friends in Bangladesh including S. I give these little weight as their evidence has not been tested under cross-examination.
- (iii) I have serious concerns about the timing of the Appellant's asylum claim. His immigration history shows that he made several other unrelated applications under the Immigration Rules. He appears to have said nothing about his sexual orientation in them. In December 2006, he applied for a six month visitor visa, which was refused. He unsuccessfully appealed that decision on 11 February 2007. He unsuccessfully appealed the decision and his application was dismissed on 17 June 2007. He then arrived in this country on 19 November 2009 on a student visa. He successfully extended his visa which expired on 28 June 2014. He unsuccessfully applied to have his visa extended further and his appeal was dismissed. He became appeal rights exhausted on 16 May 2016. It was only after he had become appeal rights exhausted in respect of his visa that he applied for asylum. He claimed asylum nearly seven years after the alleged incident. He says that he delayed doing so because of problems with the fast-track system and because he could not find a solicitor in London to represent him. I do not accept this as plausible or credible. He is an educated man and claims to come from a wealthy family and he was experienced with dealing with the Immigration Rules, including appealing earlier decisions. London is a huge city with numerous firms of solicitors ready, able and willing to take instructions on asylum claims dealing with all manner of case histories many of them containing narratives that are embarrassing and distressing to their clients. Solicitors have a duty to act in the best interests of their clients and to be fearless advocates. They are bound by rules of professional conduct not to discriminate against their clients regarding protected characteristics under the Equality Act 2010. Sexual orientation is a protected characteristic. I simply do not believe the Appellant's claim that he was discriminated against by firms of solicitors because he was gay. If he was discriminated against, he could have complained to the Solicitors Regulation Authority. He does not appear to have done that. Finally, in respect of his timing, even if he had delayed because of the problems with the fast-track system he still waited until 2016 to make his claim. I believe that the Appellant had simply ran out of options under the Immigration Rules

and he made a last-ditch attempt to stay in this country by claiming asylum. If he had a genuine fear of persecution and had come to this country in 2009 because of that, he could and should have made his asylum claim earlier.

- (iv) The Appellant has also claimed very late in the day that when he was detained by the police in 2009 they applied electric shocks to his penis. He has not referred to this in his Asylum Interview Record or in his witness statement. The alleged electrocution only comes to light in the hospital discharge certificate. He says that he was embarrassed and felt coy and that was why he said nothing about it earlier. The fact that he was able to answer probing questions about his sexual behaviour under cross-examination did not reveal a person who was backward in coming forwards or who was coy or embarrassed about his sexual history. I do not accept his explanation. He should have provided details of this alleged electrocution much earlier in the asylum process. It is a material averment of fact and his failure to do that significantly damaged his credibility. This is simply an embellishment to enhance an otherwise weak claim and it is contained in a document of dubious provenance.
- (v) In support of his claim that he was beaten and tortured, I was referred to the hospital discharge certificate. I share Miss Choudhary's concerns about that document given the fact that his age was incorrectly recorded on it. A patient's date of birth is a fundamentally important matter and record in medical matters and I would have expected this to have been correct. I also find it strange that all his other personal details were correct, a fact which he acknowledged under cross-examination. I give that document no evidential weight.
- (vi) The Appellant has provided some evidence of his social media profile together with email correspondence from Stonewall and has attended the Pride march this year. He has also provided some photographic evidence to support his claim to be gay. I agree with the Respondent that being a homosexual is not a prerequisite to attend such marches and it is not evidence per se of his sexuality. I am also surprised that if the Appellant was a man who regularly engaged in same-sex casual relationships and who uses social media as a means of meeting contacts, he would have had much more prolific profile than he did. He has also provided very limited evidence of attending clubs. The fact that he goes to clubs frequented by gay men is not per se evidence that he is a homosexual.
- (vii) If he came to this country in 2009 as a gay man and purported to live openly and to have casual relationships over the subsequent eight years, there should have been far more evidence of that activity over

that entire period. The fact that [AA] may have met the Appellant and his friend(s) adds little to the claim that the Appellant is gay. They could simply have met in a restaurant or bar or a night out.

- (viii) He has also provided a letter from NAZ confirming his attendance since 2013. I give this little weight as it is based on the Appellant's self-reporting and it is not clear that other than meeting the Appellant in group sessions, what other evidence the author has conclude that he is a gay man.
- (ix) The Appellant states at length in his witness statement that when his family found out about his sexuality he brought disgrace to himself and to them. He was told by his mother that he had to leave the country. He claims that his family were strict Muslims. It is suggested that his father beat him. If his family strongly disapproved of his behaviour and his sexual orientation to the extent that they believed that he brought shame and disgrace on them, I find it implausible that the Appellant would continue to have a relationship with his mother. On his own evidence, he said that he was in regular contact with her and she sends him money monthly to support him. Indeed he says that he misses his family very much. This is incompatible with issues of disgrace and stigma. The fact of the matter is that he has an ongoing relationship with his mother and she is supporting him.

39. This is not a claim where the core holds true but is frayed at the edges and where there is some exaggeration or uncertainty. Rather, this is a case where the Appellant has had many years to think about things and I think he has concocted his claim. He can safely return to Bangladesh."

The Grounds of Appeal and Submissions

7. Ms Reid focussed primarily on the treatment of AA's evidence. She stated that the judge gave it insufficient consideration. Not only had AA known the Appellant in Bangladesh and the Appellant's family, he had met his partners here. The judge failed to make findings about his evidence. In oral submissions, Ms Ahmad submitted that the judge was not under an obligation to provide detailed reasons. The judge was aware that AA's evidence was that he had met the Appellant's partners. However, he did not find the evidence credible and thus referred to them as friends in his findings. Any error is not material, in any event, according to Ms Ahmad because it is difficult to see how the judge could have reached a different conclusion.

Error of Law

8. Whilst it was open to the judge to find that the evidence of a AA was not probative, lacking in credibility or unreliable and to attach little or no weight to it, in this case the decision of the judge that AA's evidence "adds little" is inadequately reasoned. AA

claimed to be a close childhood friend, that the Appellant was arrested in 2009, to have discovered the Appellant was gay in 2009 and to have knowledge of the Appellant's family. He also claimed to have met at least one of the Appellant's casual partners. He was not cross-examined about evidence in his witness statement relating to events in Bangladesh. His evidence was capable of supporting the Appellant's evidence. There were significant problems with the Appellant's evidence as lawfully found by the judge; however, the judge has either failed to consider the evidence of AA (contained in his witness statement) or failed to provide adequate reasons for concluding at [38] vii that it "adds little" to the Appellant's claim to be gay. Either way the error is material because I cannot say with certainty that had the error not occurred the judge would have reached the same conclusion. The remaining grounds amount to disagreements with the decision of the judge. It is not necessary for me to engage with them.

Remittal to the FtT

9. I set aside the decision of the judge to dismiss the Appellant's appeal. I have regard to Paragraph 7 of the Practice Statement of 25 September 2012 under the heading: Disposal of appeals in Upper Tribunal states;
 - 7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
 - 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
 - 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

10. The material error goes to the heart of the findings in respect of the Appellant's credibility and as such, no findings made by the judge can be salvaged. The appeal is to be heard afresh. It is appropriate in these circumstances to remit to the First-tier Tribunal because there will need to be extensive fact finding to determine credibility and risk on return.

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 their 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.

Signed

Joanna McWilliam

Date 9 July 2018

Upper Tribunal Judge McWilliam