



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09018/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 25th July 2019

Decision & Reasons Promulgated
On 02nd August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

M A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R O’Ryan of Counsel instructed by Scarsdale Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Holt (the judge) of the First-tier Tribunal (the FtT) promulgated on 12th April 2019, following a hearing which took place on 2nd January 2019.

2. The Appellant is a citizen of Pakistan. He claimed asylum in the UK on the basis that he is gay, and would be persecuted if returned to Pakistan. His application for international protection was refused on 4th July 2018 and he appealed to the FtT.
3. The Appellant gave evidence before the FtT as did three witnesses on his behalf.
4. The judge found that one of the witnesses, Mr Ali, had either written the Appellant's witness statements or had a very close influence in their creation. The judge recorded that she was "suspicious of Mr Ali's role in the case generally, particularly given that I was aware that he had had a successful claim on the basis of being found to be gay".
5. The judge found, as was agreed by both parties, that the issue in the appeal was whether or not the Appellant is gay. The Respondent's case is that the Appellant is not gay. It was accepted that if the Appellant is gay, he would be at risk in Pakistan.
6. The judge found Mr Ali to be a very unimpressive witness. With reference to another witness called by the Appellant, Mr Ahmed, whose evidence was that the Appellant is gay, the judge found that his evidence added nothing to the claim. Evidence was also given by Mr Walker, described as the chairperson of an organisation called Plus, which looks after the LGBT community. The judge found that Mr Walker had accepted the Appellant's claim to be gay at "face value" and he had been duped by the Appellant.
7. The judge found section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2014 to be relevant noting that the Appellant had been in the UK since May 2011 and that he had overstayed, and made EEA applications to remain in the UK. The Appellant had previously made an asylum application in 2015 without claiming to be gay. The judge found the Appellant to have fabricated his claim to be gay and found him to be an economic migrant. The appeal was dismissed on all grounds.

The Application for Permission to Appeal

8. The Appellant relied upon four grounds.
9. The first ground contends the judge erred in taking into account irrelevant information and erred in making findings in relation to demeanour. The judge had at paragraph 16 referred to country guidance case law on Iran and also made reference to further case law on Iran at paragraph 17. This was not relevant to the Appellant's case.
10. The judge had commented upon the demeanour of Mr Ali noting that he positioned himself so that he could see the Appellant when giving evidence and the judge formed the impression that the Appellant was nodding when Mr Ali answered questions. The judge at paragraph 23 made reference to the Appellant "nodding in a way that suggested indication of an affirmative answer to the first key questions." It was submitted that the judge had failed to particularise what the first key questions were, or what material advantage the Appellant gleaned from this conduct. It was

contended the judge had acted irrationally in placing reliance on this issue. In addition this was not raised at the time with the Appellant or Counsel which was unfair.

11. It was submitted that the judge had not put to the Appellant, Mr Ali, or Counsel concerns about Mr Ali being involved in preparing the Appellant's witness statement. It was submitted this was unfair.
12. It was submitted that the judge had taken into account an irrelevant issue when describing Mr Ali's claim for asylum (which was successful) as being very similar to the Appellant's.
13. The second ground related to the judge's finding in relation to the Appellant's sexuality. It was contended that at paragraph 25 the judge identified "another key reason" to reject the relationship between the Appellant and Mr Ali but failed to give adequate reasons for this. The judge in that paragraph described the relationship between Mr Ali and the Appellant as being "presented as being about little more than sex, apart from occasional trips to Costa Coffee. This did not ring remotely true." The judge had not explained this finding.
14. Ground three contends that the judge irrationally rejected the evidence of supporting witnesses. The judge at paragraph 31 found that the evidence of Mr Ahmed "added nothing to the claims." No adequate explanation had been given by the judge to explain that.
15. The judge found that the witness Mr Walker had been "duped" by the Appellant and discounted his evidence because of the "other evidence". The judge had not particularised what the "other evidence" was and had not assessed the supporting witness evidence in the round.
16. The fourth ground relates to section 8 of the 2004 Act. It was submitted that the judge had started considering credibility by considering section 8 which was contrary to the guidance given in IT (Cameroon) [2008] EWCA Civ 878.

The Grant of Permission to Appeal

17. Permission to appeal was granted by Judge Scott-Baker in the following terms;

"The first ground arguably has no material substance. However, reading the determination as a whole it is arguable, based on the grounds, that the FtT Judge had been procedurally unfair in failing to put concerns as to the behaviour of the witness to the Appellant at the hearing. It is also arguable that the judge failed to give appropriate weight to the evidence of the witnesses and also failed to arguably give adequate reasons."

18. Following the grant of permission directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

My Analysis and Conclusions

19. At the oral hearing before me Mr O’Ryan expanded upon the Grounds of Appeal. He did not pursue Ground one, nor Ground four.
20. Mr McVeety accepted that the judge had erred at paragraph 25 when describing the relationship between the Appellant and Mr Ali but contended that this error was not material, and the judge had made numerous sustainable findings which entitled her to reach the conclusion that the Appellant was incredible, and the witnesses could not be relied upon.
21. Mr O’Ryan was clearly correct not to pursue Ground one. There was no need for the judge to set out case law in relation to Iran and conversion to Christianity. However this was not relevant to the issues before the judge, and did not amount to a material error of law.
22. Mr O’Ryan was also correct not to rely upon Ground four. In my view the challenge made in the grounds on section 8 of the 2004 Act is misconceived and unfair. When considering section 8 of the 2004 Act the judge referred to SM (Iran) [2005] UKAIT 00116, when it may have been more appropriate to refer to JT (Cameroon) [2008] EWCA Civ 878, but correctly gave a self-direction, that where section 8 applies, a judge should look at the evidence as a whole, and decide which parts are more important and which are less, and section 8 does not require the behaviour to which it applies to be treated as the starting point of the assessment of credibility.
23. I am however persuaded that the judge did materially err in law in the following ways.
24. It was accepted on behalf of the Respondent that the conclusion in paragraph 25 was not sustainable. For ease of reference I set out paragraph 25 below;
 - “25. Another key reason what (sic) I am not satisfied by the alleged relationship between the Appellant and Mr Ali is that there were scant details of friendship, affection, shared interests or any of the facets of a normal intimate relationship, despite having gone on for over seven months now. The relationship was presented as being about little more than sex, apart from occasional trips to Costa Coffee. This did not ring remotely true. Rather, the supposedly key relationship that purported to prove that the Appellant is a real gay man was presented as a one dimensional cliché of gay life, a stereotypical gay relationship, as gay men being promiscuous and only interested in sexual encounters and Gay Pride. The description of the purportedly key relationship was lacking in any of the nuanced, subtle details of a real human relationship, especially one that had lasted seven months or so.”

25. I find there is a lack of reasoning for the conclusion reached. Witness statements had been made by the Appellant and Mr Ali. The Appellant's witness statement commences at page 14 of the Appellant's bundle before the FtT and in paragraph 27 he describes starting to sleep together with Mr Ali in mid-June 2018. He further describes going to Costa Coffee in Manchester and sometimes meeting at his home but more often outside. The concluding sentence is "We are physically involved only but I don't know if it will go anywhere as Ali enjoys casual sexual relations."
26. Mr Ali's witness statement is at page 22 of the Appellant's bundle that was before the FtT and in paragraph 11 the concluding sentence is, "We are physically involved only but I don't know if it will go anywhere as I enjoy casual sexual relations." The evidence of the Appellant and Mr Ali was therefore that they had a limited relationship, but what is not explained by the judge is why that does "not ring remotely true".
27. I do find this to be a material error. It is unclear to a reader of the decision why the relationship described by both the Appellant and Mr Ali is not accepted.
28. I find a material error of law in the judge's treatment of the evidence of Mr Ahmed. The judge deals with this at paragraph 31 concluding that paragraph with the following sentence, "I found that his evidence added nothing to the claims." Mr Ahmed's witness statement confirmed that he had known the Appellant for approximately a year at the date he made his statement. He had met him many times particularly at LGBT social gatherings. He believed the Appellant to be gay. He expressly stated at paragraph 7 of his statement that he had seen him at a particular club and seen him regularly with Mr Ali. He said that he had seen the Appellant and Mr Ali to be very physical with one another at Mr Ali's house. At paragraph 8 of his witness statement he described the Appellant and Mr Ali as often kissing each other.
29. The judge has not explained why evidence couched in the above terms adds nothing to the Appellant's claim to be gay. If the evidence given by Mr Ahmed was to be rejected, reasons must be given for not accepting that evidence. There were no such reasons given. The judge commented at paragraph 31 that Mr Ahmed was vague about where the Appellant lived, but Mr Ahmed's evidence was that he had seen the Appellant and Mr Ali at Mr Ali's house, not at the Appellant's house.
30. I am persuaded that the judge materially erred in making an adverse finding when recording that (at paragraph 21) "It is striking that this Appellant's claims appear to be very similar to Mr Ali's in terms of groups that the Appellant has been attending since identifying as gay (more of which below) and enthusiastic attendance at Gay Pride events."
31. The judge did have a copy of Mr Ali's successful appeal decision made by Designated Judge McClure. In that decision at paragraph 66, Judge McClure specifically considered whether Mr Ali's activities were just a front created to support an asylum claim. He noted there was a group of individuals claiming

asylum on the basis of sexuality all of whom had the same ethnic origin. Judge McClure's conclusion was that the activities were not a front and he did not find it unusual that people with the same cultural background were able to meet by use of the internet and contact others with similar experiences. The finding made by Judge McClure is of course not binding upon the judge, but does not appear to have been considered.

32. I find that the judge erred in not attaching any weight to Mr Walker's evidence. The judge accepted Mr Walker to be a sincere witness but took the view that he had been duped by the Appellant because of "all the other evidence in the case" (paragraph 33). I find that the judge's consideration of that other evidence, is legally flawed, and therefore the judge has not given adequate reasons for placing no weight upon the evidence of Mr Walker.
33. The decision of the FtT is comprehensive and has been prepared with care. However for the reasons given above, I find that it is unsafe and must be set aside.
34. Both representatives agreed that if I found an error of law as contended by the Appellant, it would be appropriate to remit this appeal to the FtT to be heard again.
35. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeal back to the FtT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.
36. The parties will be advised of the time and date of the FtT hearing in due course. The appeal is to be heard by an FtT Judge other than Judge Holt.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

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 his 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

Date 25th July 2019

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

I make no fee award. The issue of any fee award will need to be considered by the FtT.

Signed

Date 25th July 2019

Deputy Upper Tribunal Judge M A Hall