Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: PA/10964/2017

THE IMMIGRATION ACTS

Heard at Field House	Decision & Reasons Promulgated
On 27 November 2019	On 13 December 2019

Before

UPPER TRIBUNAL JUDGE GILL

Between

AM
(**ANONYMITY ORDER MADE)** Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. I make this order because this is a protection claim. No report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the appellant: Mr D Sellwood, of Counsel, instructed by Wilson Solicitors LLP.
For the respondent: Mr L Tarlow, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Uganda born on 31 August 1986, appeals against the decision of Judge of the First-tier Tribunal P-J S White who, in a determination promulgated on 23 August 2019 following a hearing on 19 June 2019, dismissed his appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 19 July 2017 to refuse his protection claim.

2. The basis of the appellant's protection claim was that he would be at risk of persecution in Uganda on account of his sexuality. He is gay.

3. It is unnecessary to set out in detail the evidence that was before the judge. It is sufficient to say that this included evidence that the appellant began his only same-sex relationship when he was 15 years old with a boy named ET whom he met at school in 2001 and that, on one occasion in 2001, ET got drunk in a pub and kissed the appellant in public. They otherwise kept their relationship secret. The relationship continued for 3 years until 2004, when they went to different universities.

4. The judge said that he was "*not persuaded that the appellant was a credible or indeed a truthful witness*" (para 29). He rejected the appellant's claim to be a homosexual and said that he was unable to accept his account of events in Uganda.

5. The judge gave his reasons for his adverse credibility assessment at paras 16-29 of his decision. It is unnecessary to set his reasons out in detail. The following is sufficient:

6. At para 20 of his decision, the judge said that it was "*of far greater concern*" (than the matters he had considered at paras 16-19), that the appellant maintained that he had met ET when they were in the same class at school, that they had been in the same stream and had finished school together. The judge noted that there was a 4-year difference in age between the appellant and ET, that they met when the appellant was 15 years old and ET was 11 years old and that they went to university when they were respectively 18 years and 14 years old. The judge then said, at para 20:

> "The suggestion that they went through school together despite this difference in their ages is not credible…."

7. The judge also considered that the appellant's evidence, that ET had gone to the pub with him at a time when ET would have been 11 years old, lacked credibility (para 21).

8. The judge then went on to consider other aspects of the evidence before stating, at para 29:

> "I have considered all this evidence with care and in the round, and reminding myself of the low standard of proof. I give weight to the fact that there are people who know and believe the appellant, and that that *[sic]* the two experts have found his account plausible. Against that I note what seem to me to be significant credibility concerns over aspects of the appellant's account. And in particular that **the central claim**, to have formed a relationship with a person in the same class at school, **cannot be true**, given [ET's] actual age…."
>
> (my emphasis)

The grounds

9. There are two grounds. Ground 1 is that there has been procedural unfairness on account of the judge's failure to put to the appellant his concern about the age

difference between the appellant and ET in relation to the credibility of the appellant's evidence that he and ET had been in education together and that ET had attended a pub with the appellant notwithstanding that he was 11 years old at the time.

10. An application was made under 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules") to admit the following documents:

    i) ET's academic transcript from [MUST] showing that ET had attended university between 2004 and 2007 from the ages of 14 to 17, consistent with the appellant's account; and

    ii) a report by SALVE international on education in Uganda, confirming school classes in Uganda are not based on age which (ground 1 contends) means that children might be in classes with students who are a lot younger or older than them.

11. The appellant also submitted a witness statement dated 5 September 2019 in which he said, inter alia, that, if he had been asked about the age difference between ET and himself, he would have explained as follows:

    i) Classes in Ugandan schools are made up of children of different ages. This is because children in Uganda do not all start school at the same time as it is dependent upon when the parents are able to afford to send them. In addition, when he attended university, there was a mix of ages.

    ii) It was not unusual for younger people to go to the pub because the owners do not mind how old a person is if he has the money to buy from them.

12. It is not necessary to refer to or deal with ground 2.

Assessment

13. The first issue is whether the post-hearing evidence described at paras 10 and 11 above is admissible in order to establish that there has been procedural unfairness and, if so, whether it should be admitted for that purpose.

14. Mr Tarlow accepted that the evidence was admissible and should be admitted. I agree. My reasons are as follows:

15. It is axiomatic that, in general, evidence that was not before a judge cannot be relied upon in order to establish that the judge had erred in law. However, in certain circumstances, post-hearing evidence is admissible. One such circumstance is in order to establish that there has been procedural unfairness. This is consistent with the reasoning of the Court of Appeal in R (Iran) v SSHD [2005] EWCA Civ 982; in particular, at para 28 onwards, where the Court discussed the admission of post-hearing evidence in order to establish that the outcome in the lower court was unfair as a result of a mistake of fact.

16. In the instant case, the appellant seeks to rely upon the post-hearing evidence in order to establish that there has been procedural unfairness due to the judge's failure to put to him the concern of the judge in relation to the credibility of certain aspects of his account due to the age difference between himself and ET. It is clear from the judge's reasoning, as Mr Tarlow accepted, that the judge considered that the difference in ages between the appellant and ET went against the appellant's credibility on what the judge considered was his central claim, that he had formed a relationship with a person four years younger who was in the same class. The difference in their ages had not been raised by the respondent in the decision letter

or by the respondent's representative before the judge. I am satisfied that this issue is not one that the appellant and his representative can reasonably be expected to have anticipated and dealt with on their own volition in evidence before the judge. The judge therefore took a point against the appellant, which the appellant could not reasonably have anticipated, in the absence of evidence on the issue.

17. If the judge had put the issue to the appellant, the appellant would have had an opportunity to put in evidence before the judge the evidence which he now seeks to rely upon. It is evidence which is potentially capable of addressing the judge's concern about the credibility of what he considered to be a central part of the appellant's claim and which should have been considered along with the remainder of the evidence. It was not considered because the appellant did not have notice of the judge's concern and therefore did not have an opportunity to submit the evidence to the judge.

18. In all of the circumstances, it is clear in my view, not only that the post-hearing evidence is admissible in order to establish procedural unfairness, it must be admitted for that purpose. I therefore exercise my discretion and admit the evidence for that purpose.

19. Having admitted the evidence, I am satisfied that the judge did err in law, in that, his failure to put to the appellant his concern, that the difference in ages between himself and ET went against the credibility of his evidence that he and ET had been in the same class in school and that ET had been able to go with him to a pub at a time when ET was 11 years old, has given rise to procedural unfairness. I am satisfied that the judge's failure means that the appellant did not have a fair hearing.

20. I therefore set aside the decision of the judge in its entirety.

21. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it 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.”

22. In view of my conclusion that the appellant has not had a fair hearing, this case falls within para 7.2 (a).

23. I therefore remit this appeal to the First-tier Tribunal for the First-tier Tribunal to decide the appeal on the merits on all issues.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that the decision is set aside in its entirety. This case is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a Judge of the First-tier Tribunal other than Judge of the First-tier Tribunal P-J S White.

Signed Date: 11 December 2019

Upper Tribunal Judge Gill