



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

Appeal Number: PA/11437/2018

THE IMMIGRATION ACTS

Heard at Field House

On 23rd April 2019

**Decision & Reasons
Promulgated
On 15 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR M.Z.R.
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy of Counsel instructed by Arshed & Co Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 13th April 1988. The Appellant had applied for asylum based on his fear that if returned to Pakistan he would face mistreatment due to his sexuality. That

application was refused by Notice of Refusal dated 19th September 2018. It was noted that the Appellant had had a previous refusal of an application for a residence card based on a sham marriage to an EEA national back in December 2014.

2. The Appellant appealed the Notice of Refusal of September 2018 and the appeal came before Judge of the First-tier Tribunal Oliver sitting at Hatton Cross on 26th April 2018. In a decision and reasons promulgated on 14th November the Appellant's appeal was dismissed on all grounds. Grounds of Appeal were submitted to the Upper Tribunal on 26th November 2018. Permission was refused by Immigration Judge Lambert on 19th December 2018. Renewed Grounds of Appeal were lodged to the Upper Tribunal on 30th January 2019, and on 28th March 2019 Upper Tribunal Judge Kamara granted permission to appeal. For the reasons set out in the grounds, Judge Kamara considered it was arguable that the judge had erred in his consideration of the evidence of the three witnesses and from the decision it was not possible to tell if the witness evidence was rejected or why. In addition, the other grounds which related to the assessment of the Appellant's credibility and errors of approach in considering his account of his sexuality were also held to be appealable.
3. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge.

Submission/Discussion

4. Ms McCarthy briefly starts by addressing the manner in which the judge has assessed the Appellant's credibility, advising that his credibility has been rejected in its entirety based upon his previous immigration application of a marriage to an EEA national where the judge had found that that relationship had been a sham marriage. The judge considered that the Appellant's credibility was severely damaged and that just as he lied about the marriage, he is now lying about his sexuality. She submits that when considering whether the EU marital relationship was a sham, the judge had failed to consider that there was evidence recorded that the Appellant's former wife had complained that the Appellant was not a good partner and that he did not feel sexually attracted to her. Further, she submits that the Appellant had genuinely believed in the marriage and believed himself to be the father of his wife's child and that this is supported by efforts he had made regarding his paternity. She submits that the judge had failed to look at all of the evidence when making his finding.
5. Secondly, she considers that even if the judge had been correct to find that the Appellant's relationship with an EU national was not a genuine one, it did not follow that he was necessarily lying about his current sexuality. She points out various instances, all recited at paragraph 13 of the Grounds of Appeal, by which the credibility of the Appellant's account to be a gay man had been misrecorded by the First-tier Tribunal Judge and

that the judge had failed to consider aspects of the Appellant's evidence and relevant evidence.

6. Finally, she turns to the issue regarding the judge's approach to witness evidence - this being the main basis upon which Upper Tribunal Judge Kamara granted permission to appeal. She submits that if the judge was correct to find that he could not rely solely on the Appellant's own evidence as to his sexuality, then the witness evidence would become all the more crucial in this case and that there was a requirement upon the judge to consider the witness evidence carefully. Three witnesses, she advises me, were called, one of whom was the Appellant's partner whom he has known since 2016. She advises that the Appellant was dating his partner since 2017 and has been living with him since mid-2017. She submits that the judge had completely ignored the evidence of two of the witnesses and had further declined to make any assessment at all of the weight to be given to the evidence of the Appellant's partner. In this she refers to the judge's analysis at paragraph 44. She submits that if the judge had believed that he had been duped, then at least there was a responsibility for him to give clear reasons and that no reasons had been given for doubting the credibility of his partner. For all these reasons she submits that there are material errors of law and that the matter should be remitted back to the First-tier Tribunal for rehearing.
7. In response, Mr Avery notes that there was a finding that the Appellant had previously been in a sham marriage and that the judge's consideration was perfectly proper and there was nothing fundamentally wrong about what the judge has said with regard to the Appellant's EEA application. He points out that in the subsequent asylum claim based on the Appellant's sexuality he had previously failed to mention his sexuality when making his application for asylum. He takes me to paragraphs 40 to 41 of the decision, pointing out the judge clearly knows what the evidence is and that he is entitled to consider all the evidence as he has done in the round and that against the background of the Appellant's past immigration history the judge has found against him, something that he was entitled to do. He asked me to dismiss the appeal.

The Law

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

10. The judge has taken for his starting point the adverse credibility findings made previously against the Appellant in that he had entered a sham marriage in support of his application for an EEA residence card. That in itself is something the judge was entitled to do. The judge had to remind himself that a proper approach to credibility would require an assessment of the evidence and of the general claim and in asylum claims relevant factors would be the internal consistency of the claim; the inherent plausibility of it; and the consistency of the claim with external factors of the sort typically found in country guidance. I acknowledge that it is theoretically correct that a claimant need do no more than state his claim but that claim still needs to be examined for consistency and inherent plausibility and in nearly every case external information against which the claim could be checked will be available. Unfortunately, in this instance the judge has failed to carry out a full and proper assessment of the Appellant's credibility. He has drawn the conclusion that just because the Appellant had misled the court so far as his claim for his relationship with an EU national was concerned that he is lying about his current sexuality. He may well be but it is necessary for the judge to carry out an evaluation.
11. In carrying out that evaluation it is even more important the judge gives full and proper consideration to the witness evidence that is available, particularly the witness evidence of his partner who, as Ms McCarthy states, has already got indefinite leave to remain status and who has no reason to tell lies with regard to the relationship.
12. What unfortunately the judge has failed to do is to give an analysis of the witnesses' evidence and to make findings thereon. All he has done is to look at this matter completely in the round and has come up with a conclusion that endorses his previous finding of adverse credibility. Such an approach, particularly the failure to consider and make findings on the witness evidence, creates a material error of law and renders the decision unsafe.
13. The correct approach consequently is to remit the matter back to the First-tier Tribunal for a complete rehearing with none of the findings of fact to

stand. However, I do emphasise to the Appellant that that does not mean necessarily that another judge on giving a full and detailed consideration of all the evidence will come to a different decision to that of the previous judge. That is a matter for consideration following the evidence at the restored hearing.

Decision and Directions

The decision of the First-tier Tribunal Judge contains material error of law and is set aside. Directions are given hereinafter for the further hearing.

- (1) That on finding that there is an error of law in the decision of the First-tier Tribunal Judge the decision of Immigration Judge Oliver is set aside with none of the findings of fact to stand.
- (2) The Appellant's appeal is remitted to the First-tier Tribunal sitting at Hatton Cross on the first available date 28 days hence with an ELH of three hours.
- (3) None of the findings of fact are to stand.
- (4) That the rehearing be before any Judge of the First-tier Tribunal other than Immigration Judge Oliver.
- (5) That there be leave to both parties to file and serve a bundle of subjective and/or objective evidence upon which they intend to rely at least seven days prior to the restored hearing.
- (6) That an Urdu interpreter do attend the restored hearing.

The First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and none is made.

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 15 May 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 15 May 2019

Deputy Upper Tribunal Judge D N