Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11647/2018

THE IMMIGRATION ACTS

Heard at Fox Court	**Decision & Reasons Promulgated**
On 12th February 2019	**On 18 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SHUMON [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bisson (Counsel), Mergul Law
For the Respondent: Ms J Isherwood (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge S L Farmer, promulgated on 9th November 2018, following a hearing at Hatton Cross on 1st November 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 25th October 1984. He appealed against the decision of the Respondent dated 28th September 2018, refusing his application for asylum and for humanitarian protection, pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he is a homosexual. He was born in Beanibazar, Sylhet, in Bangladesh, where he lived until he came to the UK in 2009. He has his parents, a brother and sister remaining in Bangladesh. He first realised he was gay when he was about 15 years old. He never disclosed this to anyone in Bangladesh. He did not have any relationships with either a male or female. After he came to the UK he realised he could live an openly gay life and he has had one relationship here in 2015 which lasted for some six to seven months. In January 2018 he told his parents about his sexuality. They had threatened to kill him if he returned to Bangladesh. He has not been in touch with them since. He fears his family if he returns to Bangladesh. He also fears that if his sexuality was detected in Bangladesh, he would be killed or violence would be metered out to him. He would have to supress his sexuality. He has abandoned his Muslim faith due to his sexuality.

The Judge's Findings

4. In her conclusions, the judge at the outset stated that, "To succeed in a claim for asylum, an appellant must prove, to the necessary standard, that he has a well-founded fear of being persecuted by reason of racial, religious, national, social or political characteristics that may be imputed." (Paragraph 19). The criticism that is made of the judge in this appeal is that she has not set out what she means by "the necessary standard". The judge had also earlier stated, under the heading "Burden and standard of proof" that "The burden of proof is on the appellant to show at the date of this decision there are substantial grounds for believing that the appellant meets the requirements of the Refugee or Person in need of International Protection (Qualification) Regulations 2006 …" (at paragraph 8). However, the judge had only referred to the "burden of proof" in this regard, and had not explained what the standard of proof would be. Against that background, the judge had proceeded to hold that Section 8 of the 2004 Act applied in that the Appellant's account was such that it adversely affected the credibility of the account given by him. He had not made his claim properly. He had delayed making his claim for over eight years, having arrived in 2009, and not making the claim until April 2018. It was said that, "He had stated that he did not know he could claim asylum based on his sexuality. However, he did know people who claimed asylum and would have been exposed to asylum claims within the Bangladeshi community …" (paragraph 21). In short, the judge found that the Appellant was not a credible witness (paragraph 23).

5. Finally, there had been a suggestion by the Respondent that the Appellant had engaged in ETS deception by using a proxy English speaker.

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge had at the outset stated (paragraphs 7 to 8) the approach to be taken under "burden and standard of proof", but had then made no mention at all to the "standard of proof" to be applied. It was insufficient to say that the appeal was to be determined on the basis of "the necessary standard".

8. Permission to appeal was granted on 28th December 2018, on the basis that it could be inferred that the judge had conflated the burden and standard of proof.

Submissions

9. At the hearing before me, the Appellant was represented by Mr Bisson. He relied upon the grounds of application. He further submitted that the judge had reached an irrational conclusion in stating (at paragraph 21) that the Appellant's claim that he was not aware about his right to claim asylum on the basis of homosexuality until eight years thereafter, was not credible because he would have been exposed to asylum claims within the Bangladeshi community. However, the reason that the judge gives is that, "his witness had claimed asylum in 2015 (although not on sexuality grounds). I therefore find that this does count against his credibility although it is not determinative of his claim and I bear this in mind when considering the totality of the evidence." (Paragraph 21). Mr Bisson submitted that the judge may have been able to hold this against the Appellant if the witness who appeared on his behalf had indeed claimed asylum on sexuality grounds, because then it could properly be argued that the Appellant could not have been unaware of this being a viable ground of an asylum claim, because he would have been exposed to sexuality as a basis for a claim. However, the same could not be said in the converse, as the judge had appeared to do.

10. For her part, Ms Isherwood submitted that, whereas it would have been altogether better for the judge to have expressly referred to the standard that she was applying namely, the lower standard of proof, it is not the case that the judge had in fact applied any other standard but the lower standard of proof applicable in asylum claims. One only had to read, she submitted, the body of the determination as a whole, to realise that the correct standard of proof had been applied.

11. The judge states that,

> "I find that the appellant has not established the required burden and standard of proof that he is a gay man or that he would be perceived

as a gay man in Bangladesh. I therefore find that he does not satisfy the first limb of the test set out in **HJ (Iran)**" (paragraph 31).

12. This showed that the judge was actually applying the correct standard. But more importantly, if one looks at what precedes that statement, it is clear that the Appellant's claim is that he has "had one gay relationship" and that this was in 2015 and "lasted about 6 to 7 months".

13. However, when he was asked about this relationship in his interview "his answers are vague and he did not know basic details about his claimed partner." The judge was concerned that the Appellant did not know the claimed partner's age, and whether he had siblings, or his parents' names, or the name of the restaurant where he worked. He did not know where he lived. He did not know who he lived with. The judge was clear that, "I find it not credible that the Appellant would claim to have had this relationship and yet had very sparse information about this individual, even to not knowing where he lived" (paragraph 25). This being so, there was, in substance, no error on the part of the judge.

14. In reply, Mr Bisson submitted that the judge had failed to assess credibility using a structured approach adopted by the Secretary of State given the Secretary of State's own Home Office guidance in the API. This makes it clear (at paragraph 5.4) that a structured approach to credibility assessment should focus on the credibility of the claim rather than the personal credibility of the Claimant. It makes it clear that, if after looking at all the evidence, and keeping the relatively low standard of proof in mind, the Claimant's statements and other evidence about the facts being established can be accepted, then the claim is a credible one.

15. Mr Bisson submitted that I should allow the appeal.

No Error of Law

16. I am satisfied that he making of the decision by the judge did not involve the making of an error on a point of law, such that it falls to be set aside (see Section 12(1) of TCEA 2007) and that I should remake the decision. I come to this conclusion, notwithstanding Mr Bisson's commendable efforts to persuade me otherwise. Whilst it is indeed the case that it would have been altogether better if the judge had expressly referred to the fact that in asylum claims the lower standard of proof is to be applied, upon a closer examination of the determination as a whole, it is clear that the judge has not applied the higher standard, and has not misdirected herself in this regard. There are two reasons for this.

17. First, there is the Appellant's account itself. The judge is clear that the account, even in relation to the Appellant having had "one gay relationship" is one where the Appellant's answers during his interview "were vague and he did not know basic detailed about his claimed partner", such that the information he provided was "very sparse information about this individual", even though "he claims to have been in

touch with him on a regular basis" (paragraph 25). Given the nature of the claim, the judge was entitled to require of the Appellant to provide answers as to how he met with his partner, but, as the judge explains, "I also find the appellant's answers about how and when he socialises to be vague and lacking in detail. He claimed to go to a gay club and started going to G.A.Y in 2010. However he brought no-one with him who goes to these clubs with him". When he produced three photographs of himself in front of a sign which appeared to say G.A.Y, it remained the case that, "he could not say who took the photographs" (paragraph 26). The plain fact was that the judge found the Appellant to be "not a credible witness" (paragraph 23).

18. Second, insofar as it is the case that it is being asserted that the judge erred in failing to apply the Secretary of State's own API, it is clear that even under this structured approach the judge would have been entitled to conclude that the Appellant could not succeed on the basis of the credibility of the claim, which was a matter that the caseworker should first focus on. There are five matters set out here that need to be considered. These are:

    (i) the sufficiency of detail and specificity;

    (ii) the internal consistency and coherence of the claim;

    (iii) the consistency with specific and general COI;

    (iv) the consistency with the other evidence; and

    (v) its plausibility.

    The API makes it clear that "all indicators must be applied, and the credibility of the account examined in the round". However, if one looks at the way in which the judge assesses credibility (at paragraphs 25 to 30) it is clear that the judge had approached this matter in the round and there is therefore simply no error of law and that the Appellant could not have succeeded on the basis that is being contended for.

19. No anonymity order is made.

20. This appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019