



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000011
[PA/50729/2020]; IA/02001/2021**

THE IMMIGRATION ACTS

**Heard at Field House, London
On Wednesday 6 July 2022**

**Decision & Reasons Promulgated
On Thursday 01 September 2022**

Before

**HIS HONOUR JUDGE BIRD
UPPER TRIBUNAL JUDGE SMITH**

Between

**Y T
[ANONYMITY DIRECTION MADE]**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although an anonymity order was not made by the First-tier Tribunal, this is an appeal on protection grounds. It is therefore appropriate to make that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Mr A Gilbert, Counsel instructed by Milestone solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Sweet dated 16 September 2021 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 2 February 2021 refusing his protection and human rights claims.
2. The Appellant’s claim is that he is at risk on return to Malaysia because he is gay. The Respondent rejected the claim on credibility grounds. The Judge also found that the claim was not credible.
3. The Appellant appeals the Decision on four grounds summarised as follows:
 - Ground 1: The Judge failed to give adequate reasons for rejecting the witness evidence;
 - Ground 2: The Judge made a finding unsupported by the evidence, and/or mischaracterised the evidence and/or failed to consider relevant matters;
 - Ground 3: The credibility issues relied upon by the Judge are not credibility issues at all;
 - Ground 4: The Judge’s findings in relation to section 8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (“Section 8”) do not take account of the facts.
4. The application for permission to appeal was refused by First-tier Tribunal Judge Barker on 21 December 2021 on the basis that it was out of time. However, following renewal to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Hanson on 16 March 2022 in the following terms so far as relevant:
 - “... There is arguable merit in Grounds 2 and 3. Ground 4 in isolation would not be material error and Ground 1 would not be material if the Judge’s other findings are not found to be infected by material legal error. I find that due to the brevity of the decision it is appropriate to grant permission although at the next occasion the appellant will be expected to establish the existence of legal error and to address the question of the materiality of such error. Permission to argue all grounds granted.”
5. The matter came before us to determine whether the Decision contains an error of law and, if we so concluded, to consider whether to set it

aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

6. We had before us core documents relating to the appeal, the Appellant's bundle and skeleton argument before the First-tier Tribunal and the Respondent's bundle.

DISCUSSION

7. The Judge's core findings on credibility appear at [33] to [35] of the Decision. We set those out in full so that the parties' submissions can be understood in context:

"33. There are a number of issues which go to his credibility. He claims that his cousin [A] introduced him to [J] sometime in 2015 on his first visit to the UK. When the appellant returned to Malaysia later that year, he maintains that he remained in contact with [J] and when he returned to the UK in February 2017 they started a relationship. That relationship came to an end in December 2019. The appellant's evidence regarding the strength, and indeed the existence, of their relationship is extremely slim. He claims that they remained close friends and submitted that they had plans to get married. There was no evidence of this and it was quite clear from his oral evidence that the relationship was of a flirtatious kind and maybe more akin to a friendship. Furthermore, there was no evidence at all from [A], who had apparently returned to Malaysia in 2018 and with whom the appellant remained in occasional contact, as [A] not only made the introduction to [J] but might have witnessed any relationship which might have existed. Nor is the photographic evidence of any great weight because they appear to show the appellant and [J] together in Trafalgar Square around Christmas time, but there is no other photographic evidence.

34. The additional evidence provided by the appellant's friends, [K] and [T], do not add anything to any claim which he may have. [K] has known the appellant since August 2015 and has provided accommodation to the appellant since their break up in December 2019. [T] also met the appellant in July 2015 and both witnesses said that they were aware that the appellant was gay. They were both aware of his relationship with [J]. [K] has asylum in the UK based on his gay status and [T] has a pending claim for asylum on the same grounds.

35. Finally, the appellant's considerable delay in seeking asylum goes to his credibility under s.8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. He has had many opportunities to claim asylum but did not do so until 6 February 2020. He said that he had done some research while in Malaysia and had discussed the matter with friends, but still delayed making his claim for asylum until 6 February 2020. This was shortly after he broke up with [J] in December 2019. However, in his screening interview

(question 7.1 to 7.2) which took place on 18 February 2020, he stated that he intended to make a claim for asylum when he came to the UK, but did not then tell the immigration officer on arrival.”

Mr Gilbert relied upon the pleaded grounds which he expanded upon in the order pleaded. We take them in that order.

Ground 1

8. This ground challenges the Judge’s finding at [34] of the Decision that the evidence of [K] and [T] did “not add anything” to the Appellant’s claim. Mr Gilbert took us to their statements which potentially corroborate the Appellant’s case as to the formation of the Appellant’s relationship with [J] and the break-up of that relationship. He submitted that this evidence was probative of the Appellant’s account and if the Judge refused to give this evidence weight, he had to explain why. The Judge had made no finding that [K] and [T] were not credible. He had provided no reasons for any adverse credibility findings in relation to their evidence.
9. Ms Gilmour responded on the basis that the ground was merely a disagreement with the Judge’s finding. When we asked her to point to any other part of the Decision which might support the Judge’s finding that the evidence should, in effect, be given no weight, she pointed to what the Judge said at [33] about the “appellant’s evidence” which she said might be intended to refer to all the evidence produced on his behalf and not simply his own statement. The Judge there said that the evidence was “extremely slim”. That was the case. There was no corroborative evidence, for example, screenshots showing messages exchanged between the Appellant and [J].
10. We accept that the first of the grounds discloses an error in the Judge’s failure to provide reasons. We accept Ms Gilmour’s submission that the conclusion might have been open to the Judge on the evidence. However, the Judge has failed to explain why the evidence of [K] and [T] which was potentially corroborative of the Appellant’s own evidence about his relationship with [J] and which is based on their own observation of that relationship and not the Appellant’s say-so, should be given no additional weight.

Ground 2

11. The second ground focusses on the Judge’s characterisation of the evidence about the relationship between the Appellant and [J] as being of “a flirtatious kind and maybe more akin to a friendship” ([33] of the Decision).
12. The Appellant says that there was no evidence to support this analysis and the Judge has pointed to none. It is said that the only evidence was contained in a submission from the Appellant’s Counsel which it is said is inaccurately summarised at [27] of the Decision.

13. We had some difficulty in following this point. The Appellant's own statement to which Mr Gilbert referred at [20] of that statement describes a "chemistry" between the Appellant and [J] emerging and goes on to say that "[w]e had not expressed this to one another, but it was clear in our speaking, in the effort we made and the jokes between us that anyone on the outside would deem as flirting."
14. We do accept Mr Gilbert's point however that the Judge refers only to this aspect and fails to make mention of the remainder of the statement which describes the relationship progressing to a sexual relationship and to co-habitation. There is reference at [18] of the Decision to the Appellant's evidence that he and [J] had "arranged to get married and planned to live together" but no mention of the evidence contained in [44] to [49] of the Appellant's statement nor the evidence about the breakdown of the relationship at [58] to [65] of the statement.
15. We also accept Mr Gilbert's point that even if the evidence had started and ended with a flirtatious relationship, that might support rather than undermine the Appellant's case that he is attracted to men.
16. For the foregoing reasons, we accept that the Judge has failed to have regard to relevant evidence. That is an error of law.

Ground 3

17. We were less persuaded by the Appellant's third ground. This concerns evidence which might have been but was not adduced by the Appellant. We have already referred to Ms Gilmour's submission that there was a lack of corroborative evidence. The Appellant's third ground focusses on what is said about the lack of a statement from [A], the Appellant's cousin. Mr Gilbert very fairly accepted that lack of potentially corroborative evidence might amount to a reason to disbelieve a claim depending on the circumstances.
18. Mr Gilbert submitted that the Appellant was not on notice about this lack of evidence and therefore had no opportunity to provide reason why he had not obtained a statement. He also pointed out that the Respondent had not taken issue with this lack of evidence. Mr Gilbert said that there was a reason as the Appellant had lost contact with [A].
19. Although we were not taken to it by Ms Gilmour, there is in fact reference to the Appellant being asked about this at [15] of the Decision. The Appellant is said to have given evidence that he was in contact with [A] "a few months ago" and that [A] had not produced a witness statement "because the appellant did not know if it would assist him". We accept therefore that the Judge was entitled to refer to this lack of evidence.
20. However, it does appear to us that there is some tension between the Judge finding at [34] of the Decision that the evidence of witnesses who had observed the relationship between the Appellant and [J] at first hand

did not add anything and the reference at [33] to the lack of evidence from [A] (who is in effect in the same position as [K] and [T] in this regard) being reason to disbelieve the Appellant's claim. Taken alone, we would not have found this to be an error. However, taken together with the first and second grounds we accept that there is an error for this reason.

Ground 4

21. We can find no error in relation to this ground. Whilst a delay of four months might not in itself properly be described as "considerable", the delay in this case has to be viewed in context.
22. First, the Appellant's relationship with [J] is said to have started during previous visits. On the Appellant's own evidence, that relationship had progressed to a sexual relationship by February 2017. On that occasion, the Appellant remained in the UK for a year. He returned to Malaysia in 2018. He came back to the UK in August 2019 and returned to Malaysia again in September 2019. We fail to see why the fact of the Appellant being a minor during earlier visits is relevant. He has admitted that he knew by February 2017 that he was gay, had entered into a sexual relationship with [J] and knew that he could not express his sexuality (on his case) in Malaysia.
23. Second, again on the Appellant's own admission, he had intended to claim asylum prior to coming to the UK. He admits that he had researched asylum whilst in Malaysia but had not claimed on any of his arrivals in the UK including in August 2019 and on return in September 2019 when on any view he was an adult.
24. Third, the Appellant was in the UK as a visitor. He claimed asylum therefore towards the end of the period of leave that he would have been given.
25. All of those matters are relevant to the issue of delay in claiming asylum and therefore relevant to the issue whether Section 8 applies. We would not have found an error to be established by the Appellant's fourth ground.

CONCLUSION

26. For the foregoing reasons, we find an error to be established primarily by the Appellant's first two grounds. Since those concern the Judge's overall credibility findings and in spite of our views about the third and fourth grounds, the errors are material and potentially undermine the credibility findings as a whole. We therefore set aside the Decision. It is not appropriate to preserve any part of the Decision. As the challenge to the Decision relates to the credibility findings and the appeal will have to be redetermined entirely afresh, it is appropriate to remit the appeal to the First-tier Tribunal to be re-heard.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Sweet dated 16 September 2021 is set aside. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Sweet.

Signed L K Smith

Dated: 12 July 2022

Upper Tribunal Judge Smith