



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

Appeal Number: PA/00811/2021

UI-2022-001843

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 August 2022**

**Decision and Reasons  
Promulgated  
On 6 October 2022**

**Before**

**Upper Tribunal Judge L Smith  
Deputy Upper Tribunal Judge Sills**

**Between  
NX  
(Anonymity Direction Made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**ERROR OF LAW DECISION**

**Representation:**

For the Appellant: Ms Lanigan  
For the Respondent: Mr Whitwell

**Introduction**

1. The Appellant (A) appeals against the decision of First-Tier Tribunal Judge Paul (the Judge) dated 24 January 2022 dismissing his appeal against the refusal of his protection claim.

**Factual Background**

2. A is a citizen of China aged 44. The Judge summarises A's immigration history at para 2 of the decision:

*The appellant first entered the United Kingdom as a student in 2010, on a student visa. He applied for and was granted further student visas until 2018. Thereafter, he either had a general student visa, or visit visa valid from 4 June 2018 to 4 June 2021. He last left China on 2 July 2018 and subsequently claimed asylum in the United Kingdom on 27 December 2018.*

3. A's asylum claim was made on two bases. First, A claimed to be gay and at risk in China as a result. Second, A claimed to be a political opponent of the government and at risk on this basis. R refused the application on 15 April 2021 and A appealed.
4. A's appeal was then heard by the Judge on 30 November 2021 and dismissed on 24 January 2022. The Judge noted the absence of corroboration either to the claim that A was gay, or that the authorities were aware of any criticism A had made of the government. The Judge then noted A's delay in claiming asylum. The Judge then found that A's evidence had been unconvincing in that it was formulaic and vague. The Judge then found that A's case had been manufactured. A had not established that he was gay. Even if he were gay, A had not shown that that he would be at risk of persecution in China as a result. A's political activity had been anonymous and did not establish that A was either a political activist or had exposed himself. A was not a reliable witness. In relation to A's human rights claim, the Judge found that A could return to China as he had done on many occasions in the past without facing significant obstacles.
5. A applied for permission to appeal arguing that:
  - a. The approach to credibility was erroneous;
  - b. The assessment of risk on return was erroneous;
  - c. The assessment of 'very significant obstacles' was erroneous.
6. Permission to appeal was granted by Judge Beach on 20 April 2022 on the basis that it was arguable that credibility had not been assessed in the round. The Judge had arguably failed to consider the country evidence when assessing risk on return and obstacles to integration. R did not file a Rule 24 response.

### **The Hearing**

7. At the hearing, Mr Whitwell confirmed that he opposed the appeal. Mr Whitwell provided the Tribunal with a copy of Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) and R's Response to an Information Request - China: LGBT persons which was before the Judge. We then heard submissions from the representatives. We reserved our decision.

### **Findings**

8. We deal with the three claimed errors as advanced by Ms Lanigan in turn.

The approach to credibility was erroneous

9. The grounds make three arguments criticising the Judge's credibility analysis. First, it is argued that the Judge failed to consider credibility in the round. The Judge failed to consider the internal and external consistency, and the plausibility of the account, across the interviews, statements, and objective evidence. The Judge also failed to follow the correct structured approach set out in KB and AH (credibility-structured approach) Pakistan [2017] UKUT 00491 (IAC).
10. It is important to note that the approach indicated in KB is described in the headnote to that case as a 'helpful framework'. The aforementioned indicators, relied upon by A, are 'merely indicators, not necessary conditions'. KB does not set out a hard rule of law as to what matters must be taken into account when assessing credibility.
11. At paras 23-27 of the decision the Judge sets out the submissions made on behalf of A. The Judge at para 26 in particular refers to the country evidence to which he was referred by Ms Lanigan. At paras 29 and 35, the Judge makes clear that he has considered the submissions and evidence referred to in reaching his decision. It thus cannot be said that the Judge failed to take these matters into account.
12. At para 31 the Judge does consider the plausibility of A's account. The Judge rejects A's claim that he was unaware about the routes for claiming asylum when he first came to the UK. The Judge makes the point that if A's account were true, when he came to the UK in 2010 he would have had many years' experience of the problems faced by gay people in China, and so would have been alive to what he claims is a risk of persecution in China.
13. Ms Lanigan criticised the Judge for finding that consistency was an adverse factor in assessing credibility when finding that the evidence was formulaic at para 32. The same paragraph is criticised on the basis that it relies on demeanour and we consider this below. As noted, KB refers to a helpful framework for considering credibility, but not mandatory consideration. So, for instance, while internal consistency can be a positive factor in assessing credibility, KB does not suggest that this will always be a factor entitled to significant weight. There may well be legitimate reasons (which we consider below) why consistent evidence is not indicative of a credible account. The Judge did not err in some way by failing expressly to refer to the internal consistency of A's account as a positive factor or by criticising consistent evidence for other reasons. We do not accept that the Judge failed to take into account any material matters when assessing credibility.

14. So far as it is suggested that the Judge failed to consider the evidence in the round, we do not accept this. The Judge conducts his analysis at paras 29 to 32 and reaches his conclusions at para 33 and 34, with a summary at para 35. The approach indicates consideration of the evidence in the round before reaching a conclusion on credibility. Ms Lanigan's first submission identifies no error of law.
15. Second, the grounds assert that the Judge erred by making adverse findings based on demeanour, particularly given that A was giving evidence in English over the phone. It cannot be said that the Judge failed to consider that A was giving evidence over the telephone in a second language. The Judge makes explicit reference to this at para 30 of the decision.
16. In SS Sri Lanka [2018] EWCA Civ 1391, relied upon by A, the concept of demeanour is explained at para 33:

*The concept is, in the words of Lord Shaw in [Clarke v Edinburgh & District Tramways Co Ltd 1919 SC \(HL\) 35](#), 36, that:*

*"witnesses ... may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page."*

We note, given the criticism is that the Judge impermissibly considered A's demeanour, that the Judge could not see A. Any observation of demeanour must have been solely from what the Judge heard, and not saw.

17. The Judge's criticisms of A's evidence at para 32 is that his evidence was long, vague, and formulaic in the sense of being scripted. They may be generalised observations, but all of these observations would be apparent from analysis of A's evidence in the record of proceedings. In the words of Lord Shaw, they would be 'reproduced in the printed page'. While the Judge states that 'A's answers were formulaic and prepared in the sense that he had a script somewhat consistent with what he had said in his original statements and in his response to the refusal letter', we understand the reference to a script to be an attempt to explain the sense in which answers were formulaic and prepared, rather than an observation or accusation that A sounded to be literally reading a script. Our view that the criticisms made at para 32 relate to the substance of the evidence rather than the manner in which it was given is supported by Ms Lanigan's own submissions, discussed above, that the Judge erred in para 32 by holding the consistency of A's evidence, a matter of substance, against him. So, we consider that the criticisms of A's evidence at para 32 refer to the content of A's evidence, and not the manner in which it was given. We do not accept that the criticisms the Judge makes relate to demeanour.

18. We add that while we consider that the Judge's criticisms would have been apparent from the record of proceedings, we have not had sight of this and neither side sought to rely upon it. The Judge's observations themselves were not challenged in the grounds. Rather the challenge is that the Judge was overly swayed to take these matters into account in assessing credibility. We have rejected the claim that the Judge was not permitted to take these matters into account on the basis that they were observations of demeanour.
19. While Ms Lanigan relied on the case of SS Sri Lanka [2018] EWCA Civ 1391 for what it says about demeanour, the case also gives other helpful guidance about the assessment of credibility. At para 40 , Leggat LJ refers to lack of detail being an indicator of deception. We consider that the Judge's criticisms of A's evidence as being formulaic in the sense of being fixed and repetitive, and lacking in detail or vague, are legitimate criticisms of the substance of A's evidence. We are satisfied that the Judge's generalised observations were not of A's demeanour, but of the content of his evidence. The Judge was entitled to take these matters into account and did not err by doing so.
20. Even if we our wrong in considering that these were observations on the content of the evidence, rather than A's demeanour, we do not consider that the Judge erred in law in taking these matters, alongside others, into account. It is important to note the context of SS Sri Lanka. In that case the Court of Appeal considered an argument that the First Tier Judge had erred by not considering demeanour. It found that a failure to consider demeanour was not an error, and cautioned against reliance on demeanour. The case is not authority for the proposition that it is an error of law to take demeanour into account alongside other matters and no other authority was relied on before us. No doubt demeanour should not be the sole basis for a finding on credibility, and if it is taken into account it should be done with caution, but we do not accept that any consideration of demeanour in assessing credibility amounts to an error of law. Hence the Judge did not err in law in relation to this issue.
21. Third, the Judge's findings in respect of delay are said to be fundamentally flawed. The grounds suggest that the Judge made a material mistake of fact in stating that A claimed asylum in 2020 at para 17. We do not accept this. At para 17 the Judge is recording R's submissions. The Judge's factual summary at para 1 gives the correct date for the asylum claim, namely 27 December 2018. At para 31 of the decision the Judge does not repeat the error apparently made by R's representative. Further there is no indication from the Judge's discussion of the delay that he was mistaken in relation to any dates. When considered as a whole, it is clear from para 31 that the delay the Judge is referring to is the delay prior to and not from his last entry in 2018. Hence the Judge makes no mistake of fact.

22. The other complaint about delay is said to be a fairness point. It is asserted that the issue of delay was not raised at the hearing with A. Whether or not this was raised at the hearing, there is no unfairness to A. A's delay in claiming asylum between his entry in 2018 and his asylum claim in December 2018 is raised in the decision letter. As to A's failure to claim asylum prior to 2018, during his earlier periods of residence, A anticipated this issue and sought to provide an explanation at para 17 of his witness statement. The Judge explicitly rejects A's 'assertion that when he first came to the UK he was unaware of the routes for claiming asylum.' The Judge was entitled to consider and reject this claim on this issue and there was no unfairness in doing so. The Judge committed no error of law in considering delay. The grounds identify no legal error in relation to the Judge's assessment of credibility.
23. While the grounds do not argue that the Judge's reasoning is inadequate, this argument was made in oral submissions. Though the decision is brief, the reasons are explained in clear and brief terms such that A is able to understand why he lost, as required by Budhathoki. The Judge notes the lack of corroboration. This is significant given that A claims to have had at least one gay relationship in the UK and been active on gay dating websites such as Gaydar. The Judge also noted the issue of delay. The Judge was entitled to consider this to be a significant factor. A's case is that he has travelled back and forth to China as a gay man where he claims to fear persecution since first entering the UK in 2010. The Judge did not accept that A was unaware of the route to claiming asylum when he first came to the UK. The Judge also found that it was A's failure to obtain a long-term visa that prompted A to claim asylum. These matters were clearly relevant to the credibility assessment and the Judge was entitled to take them into account. As set out above, the Judge was also entitled to rely on his observation that A's oral evidence was formulaic if not vague. After finding that A had not established his claim to be gay, the Judge goes on to make legitimate criticisms of the evidence in relation to A's claimed political activism before reaching sustainable conclusions on this issue. The Judge's reasons for the factual findings on the credibility of A's account, while brief, were adequate. The grounds identify no legal error in relation to the Judge's assessment of credibility.

The assessment of risk on return was erroneous

24. Having found that the Judge did not err in law in his credibility findings and his finding that A had not established that he was gay, it must follow that there can be no material error of law in relation to the Judge's assessment of the risk faced by gay men in China. In any event, we have considered the country evidence relied upon by A, helpfully set out at para 26 of the skeleton argument before the Judge. We note that A has not claimed to be an individual working on LGBTI issues. The country reports refer to gay men facing discrimination,

social ostracism, and prejudice, but there is only a single and vague reference to LGBTI individuals reporting incidents of violence (para 26(a)(ii)). As referred to above, we are satisfied that the Judge considered the evidence relied upon by A as the Judge states he did at paras 25, 26, 29, 33 and 35. We are satisfied that the Judge was entitled to conclude that any discrimination and harassment A would face as a gay man would not amount to persecution. The grounds identify no error of law on this issue.

The assessment of 'very significant obstacles' was erroneous

25. The grounds argue that the Judge failed to consider evidence about the obstacles to integration that A would face as a gay man in China. The Judge sustainably found that A had not established that he was gay, or that he was a political activist who had come to the attention of the authorities in China. The grounds raise no other obstacles to integration beyond factual claims the Judge found that A had not established. We also note that this issue was not the focus of A's case before the Judge and that the issue is dealt with in a single sentence in A's skeleton argument before the Judge which does not refer to very significant obstacles. The Judge was therefore entitled to note the fact that A had returned to China on many occasions and find that he would face no very significant obstacles to integration. The grounds identify no error of law.

**Notice of Decision**

The Appellant's appeal is dismissed.

Signed

Date 28



August 2022

Deputy Upper Tribunal Judge Sills

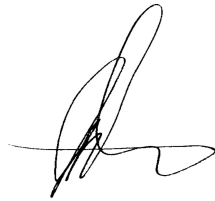
**Direction regarding anonymity - Rule 14 of the Upper Tribunal Rules**

**Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the**

**Appellant and the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.**

Signed

Date 28

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a small flourish.

August 2022

Deputy Upper Tribunal Judge Sills