IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001894
First-tier Tribunal No: PA/03373/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 March 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

IA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETATY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Khan instructed by Arshad & Co Solicitors.
For the Respondent: Mr A McVeety, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 10 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Lloyd-Smith ('the Judge') promulgated on 13 April 2021 following a hearing at

Manchester Piccadilly, in which the Judge dismissed the appellant's appeal against the refusal of his application for international protection and/or leave to remain in the United Kingdom on any other basis.

2. The appellant is a citizen of Pakistan born on 1 September 1985. The Judge sets out the issues that it was decided require determination at [14] which was whether the appellant is a gay man, or he will be perceived as being gay in Pakistan and will be persecuted and at risk on return as a result. The Judge records there being no Article 8 ECHR basis of claim at [13].

3. The Judge sets out findings of fact from [30] of the decision under challenge. The Judge's finding at [31] is that the appellant was not found to be credible in the account he gave in relation to his sexuality for the reasons set out at [32 – 43].

4. At [43] the Judge writes:

> 43. I am led to the inevitable conclusion that the appellant was an incredible witness who has failed to tell the truth about what happened to him before arriving in the UK. I have come to this conclusion after taking great care. I have nevertheless concluded that the appellant did not tell the truth in relation to matters that the material and important to the appeal. I find that the appellant is not the low standard shown that he is a member of a particular social group would face any difficulty on return to Pakistan.

5. The Judge finds the appellant had not established substantial grounds for believing that he would come to harm if returned to Pakistan and dismissed the asylum, humanitarian protection [47] and human rights appeals [48].

6. The appellant relies on four grounds of appeal. Ground 1 asserts an error by the Judge developing her own theory of the case, Ground 2 asserts the Judge failed to consider the evidence in the round, Ground 3 asserts an error in relation to the standard of proof, and Ground 4 that the Judge may have made a mistake of fact in relation to the evidence of the witness Mr Ad.. which has led to unfairness.

7. Permission to appeal was granted by another judge of the First-tier Tribunal on 19 May 2021, the operative part of the grant being in the following terms:

> 3. It is arguable that the judges approach to the evidence relating to the appellant's life in the United Kingdom including the documentary evidence of his activities and the witness evidence was flawed. Having found the appellant's claim as to what happened in Pakistan incredible, the judge finds that the additional evidence does not change the conclusion that the appellant is not credible or that he is not gay. The judge failed to consider all of the evidence in the round and whether notwithstanding that the appellant's account of what happened in Pakistan may not have been credible, his claims about his life in the United Kingdom and therefore his claim to be gay may nevertheless be true.
>
> 4. The grounds of appeal disclose arguable error of law. The grant of permission is not limited.

Discussion

8. Ground 1, in essence, asserts inappropriate judicial conduct. The full text of the pleadings relating to this ground is in the following terms:

Developing her own theory of the case

4. The Respondent was not represented at the hearing. A adopted his statement and was asked no additional questions by way of examination in chief. At [18] the FTTJ states that '*to clarify a few matters I asked the appellant some questions'*. In fact A was asked in excess of 75 questions over a period of approximately one hour. In addition the FTTJ ask questions of A's witness, particularly Mr Ad..

5. Although there is nothing wrong per se with the judge asking questions of a clarifactory nature he or she must not use any such opportunity to ask questions in order to develop her own theory of the case and must not step into the arena.

   Such an approach is unfair because it may lead to the impression that the FTTJ was not entirely neutral.

6. A respectfully submits that, upon a fair reading of the FTTJ's it is arguable that she has used her extensive questioning to develop her own theory of the case. An example of this is how the FTTJ relies on discrepancies between the witnesses concerning how they met each other and whether or not Mr Ad.. assisted A with his asylum claim [25,42].

7. In fact, almost all of the adverse credibility points taken against A concern matters that he was questioned about by the FTTJ and this in a case where A provided a detailed 10 page witness statement.

8. The Surendran guidelines governed the approach FTTJ's should take to conducting hearings in the absence of a representative for the Respondent. They set out in an annex to **STARRED MNM (Surendran guidelines for adjudicators) (Kenyan) [2000] UKIAT 00005**. At para 6 these provide:

   6. *It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.*

9. A respectfully submits that it is arguable that the FTTJ is breached these guidelines by stepping into the arena and developing her own theory of the case. A submits that this arguably undermines the entirety of her determination.

9. The Surendran Guidelines in full read:

THE SURENDRAN GUIDELINES

1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.

2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof.

3. Where an adjudicator is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in particular in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day.

4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.

5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.

6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office’s argument and basis of refusal, as

contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.

7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise, however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of *Adan*). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.

9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto.

10. We do not consider that a special adjudicator should grant an adjournment except in the most exceptional circumstances and where, in the view of the special adjudicator, matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to a special adjudicator that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which

should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing.

10. The grounds of claim show the Judge has fallen foul of [4], [5], [6] and [10] of the Guidelines. This was not disputed by Mr McVeety.

11. Ground 2 can be categorised as an assertion the Judge artificially separated elements of the evidence before coming to the credibility conclusions. The appellant's claim is that in addition to the appellant he had three witnesses all of whom attested to the fact they believed him to be a gay man. The grounds refer to [42] of the determination in which the Judge found:

> 42. Witnesses evidence. There are letters of support from the two witnesses who gave oral evidence in the appellant's bundle (pg 19 & 21). Whilst they were largely consistent in their account of how they know the appellant there were some inconsistencies in their evidence in relation to how they each met and whether or not the appellant received help with his asylum application from [Mr Ad..]. [Mr Ad..] was himself successful in claiming asylum based on his sexuality and [Mr K..] said that his partner is an asylum seeker. The benefit of such individuals to the appellant is therefore obvious but, again, given my findings in relation to his credibility does not alter my assessment of his credibility.

12. The grounds assert similar error is demonstrated at [38] in which the Judge writes:

> 38. The First Wednesday Group. The fact that the appellant only chose to make an application following hearing about the rights of LGBTQ people and the work of the First Wednesday Group in 2019 fits in with my finding that this is a last ditch attempt by the appellant to find another basis upon which he can remain in the UK. The evidence provided by the group does nothing more than say that he attended sessions. The most recent letter from Philip Jones merely sets out how the meetings have taken place during the Covid 19 pandemic and confirms the dates that the appellant attended (A pg40). These are sessions which, from the material provided would no doubt be beneficial to genuine asylum seekers seeking protection on the basis of their sexuality and those who wish to fabricate such a claim. There are details of a presentation entitled "good evidence for an LGBT asylum claim" (R pg 68) and "Key documents in your asylum case history" (A pg 85). There is no personal reference by a member or leader stating that they know the appellant well and setting out his active participation or their own discussions with him supporting his claim to be gay, which clearly would have carried more weight than confirmation just of his attendance. Attending a monthly meeting is an easy thing to do if you believe it will boost your asylum claim but, given my other findings does little to persuade me that the appellant is genuine in his claim to be gay.

13. The appellant's concerns directly relate to the Judges phrase "*given my other findings*".

14. Where such an issue arises reference is ordinarily made by representatives to the decision of the Court of Appeal in Mibanga [2005] EWCA Civ 367. The case of more relevance however is that of the Court of Appeal in S v SSHD [2006] EWCA Civ 1153 in which the Court of Appeal said that an error of law only arose in this type of situation where there was artificial separation amounting to a

structural failing, and not where there was a mere error of appreciation of the medical evidence. Mibanga was distinguished. The Court of Appeal said that Mibanga was not to be regarded as laying down a rule of law as to the order in which judicial fact finders were to approach evidential material before them.

15. Although S v SSHD and Mibanga specifically relate to the assessment of medical evidence they have equal application to cases such as the current case where the question is whether the evidence was compartmentalised or whether it has been considered as a whole before the key findings were reached.

16. Mr McVeety made specific reference to this ground, accepting that a reader of the determination would gain the impression that the Judge had decided the appellant lacked credibility before considering the witness evidence and evidence from the First Wednesday Group, and then use that adverse credibility finding to justify no weight being given to this evidence, and that legal error had been made out.

17. Ground 3, headed "standard of proof" refers to the Judge's finding at [42] in relation to which the grounds argue that the sentence is illogical, as if attendance at LGBT events is equally compatible with a genuine claim as with a false one and the standard of proof is only a reasonable likelihood then it is argued it is difficult to see how attendance at such events can be dismissed in the manner it was by the Judge. The Grounds also argue the Judge applied the wrong standard of proof which it is submit also calls into question her treatment of other evidence such as text/WhatsApp messages. I find no legal error made out in relation to the question of whether the Judge applied the correct standard of proof. The significance of attendance at LGBT events will have to be considered afresh in any event in light of the accepted errors set out in Ground 1 and Ground 2.

18. Ground 4 refers to the evidence of Mr Ad.. The Judge at [43] finds that the witness statement was written by another because it is English, yet the witness gave oral evidence with the assistance of an interpreter. The ground asserts this conclusion does not follow as a person could have better spoken and written English and the Judges finding reveals she may have made a mistake of fact leading to unfairness. I find merit in this ground as the Judge provides insufficient reasons for the conclusion set out although, again, this evidence will have to be considered afresh at the next hearing.

19. I find as a result of the errors made by the Judge, set out above, particularly in relation to Ground 1, that there are concerns about the fairness of the proceedings. Accordingly I find the Judge has erred in law in a manner material to the decision to dismiss the appeal. The determination of the Judge shall be set aside with no preserved findings. The appeal shall be remitted to the First-tier Tribunal sitting at Manchester to be heard afresh by judge other than Judge Lloyd-Smith.

Notice of Decision

20. First-tier Tribunal Judge erred in law. The determination of the Judge shall be set aside. The appeal shall be remitted to the First-tier Tribunal sitting in Manchester to be heard *de novo* by a judge other than Judge Lloyd Smith.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 February 2023