



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/02084/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 26 October 2017**

**Decision & Reasons  
Promulgated**

**On 15 November 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**MR SA**

(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms R Popal, Counsel instructed by Bespoke Solicitors

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.
2. The appellant is a citizen of Bangladesh. His date of birth is 1 February 1975. He appeals, with permission, to the Upper Tribunal against a

decision of the First-tier Tribunal dismissing his appeal against the respondent's decision refusing his claim for asylum.

3. The appellant arrived in the United Kingdom as a visitor in January 2003. When his period of leave expired he remained in the UK as an over stayer. In April 2014 he applied for leave to remain on the basis of family and private life. This application was refused by the Secretary of State in July 2014. On 27 June 2016 he was served with administrative removal notice papers as an over stayer. On 1 September 2016 he claimed asylum. The respondent refused his asylum claim by way of a decision dated 16 February 2017. The appellant appealed against that decision to the First-tier Tribunal.

### **The appeal to the First-tier Tribunal**

4. In a decision promulgated on 11 May 2017 First-tier Tribunal Judge Callow dismissed the appellant's appeal. The First-tier Tribunal did not find the appellant to be a credible witness and found that the core details of his claim were not credible. The First-tier Tribunal dismissed the appeal on asylum, humanitarian protection and Human Rights grounds.
5. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 7 June 2017 First-tier Tribunal Judge Landes refused the application for permission to appeal. The appellant renewed his application for permission to appeal to the Upper Tribunal and on 5 September 2017 Upper Tribunal Judge Pitt granted the appellant permission to appeal.

### **The hearing before the Upper Tribunal**

6. The grounds of appeal assert that the assessment of the appellant's sexuality and subsequently his credibility failed to apply the UNHCR guidelines correctly or rationally. The First-tier Tribunal Judge erred by applying an objective standard in reaching the decision that the appellant is not gay. The UNHCR guidelines on assessing sexuality state that "assessment of credibility in such cases needs to be undertaken in an individualised and sensitive way". The blanket and generalised method of assessing the appellant's sexuality that has infected the entire decision is neither individualised or sensitive and therefore the judge's findings that the account is implausible and that the appellant's homosexuality is fabricated to bolster his claim is irrational. It is submitted that credibility based solely on the basis of stereotyped notions does not satisfy the individualised assessment needed to comply with Article 4(3) of the Qualification Directive and Article 13(3)(a) of the Procedures Directive. Reliance is placed on the case of **C-148/13 to C-150/12 A, B and C v Staatssecretaris van Veiligheid en Justitie [2014]**. The judge has erred by failing to note that not declaring homosexuality at the outset to the relevant authorities and in the screening interview cannot result in a conclusion that the individual's declaration lacks credibility. The judge erred in applying the correct psychological consideration set out by the UNHCR guidelines that state that LGBT individuals may harbour deep

shame and/or internalised homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. The cultural background of the appellant plays a large part in how the person self identifies and applicants from highly intolerant countries may not readily identify as LGBTI. It is submitted that to expect those with such deep rooted psychological and emotional conflict and turmoil to be able to give a consistent account of feeling gay is irrational and inconsistent with how to properly assess the credibility of the appellant. At the screening interview the Home Office Presenting Officer and finally the judge all applied and expected a higher standard of proof without following the **Sivakumaran** guidelines of a lower standard of proof. It submitted that it is irrational to expect the appellant to give a consistent and strong evidentiary account of his homosexuality and to assess lack of credibility for failing to do so. It is irrational to infer that a person already having lived a life under close and prejudicial scrutiny to then hear from those he is seeking validation and understanding from that he is in fact not gay and is lying would feel under pressure and unable to give a clear recollection on everything that occurred during his 'coming out' period.

7. The judge has materially erred in law by stating that the details of the claim are not credible and to have been belatedly made up and has therefore come to a perverse conclusion that the appellant is not gay and is fabricating his story. This is contradictory to Home Office guidelines. It submitted that to implicitly require photographic evidence to demonstrate homosexuality holds little probative value and is contrary to the respect for private and family life and human dignity. It submitted that it is irrational for the judge to infer in paragraph [16] of the decision that the appellant's reluctance or inability to coherently describe detailed aspects of his personal life should be taken as a lack of credibility. It is irrational and a material error on the part of the judge in paragraph 34 to not consider that the removal of the appellant would be unduly harsh given the consequences he would face were he returned to Bangladesh as a failed asylum seeker who ran a case on the grounds of homosexuality. This fact in itself would put the appellant at a higher risk of persecution in his home country given the cultural and religious prejudice and animosity in Bangladesh to both homosexuals and those seeking asylum in the UK on such grounds.

### **Preliminary Issue**

8. At the beginning of the hearing Ms Popal raised the issue that an interpreter was not present. She indicated that her instructions were that a request for an interpreter to be present at the hearing had been made by her instructing solicitors. I adjourned briefly to enable Ms Popal to obtain confirmation from her instructing solicitor. After a short adjournment Ms Popal indicated that her instructing solicitor had assured her that an application had been made for an interpreter to be present at the hearing and that this had been requested on the basis that this was an error of law hearing. Ms Popal indicated that her instructing solicitor would confirm when the application had been made to the Upper Tribunal. I

therefore adjourned for a further short period to enable Ms Popal to obtain evidence of when the application had been submitted. When the hearing resumed Ms Popal advised that in fact no application had been made by her instructing solicitor for an interpreter to be present. Ms Popal made an application for the hearing to be adjourned so that an interpreter could attend at a hearing on another date and that her instructing solicitor would undertake to ensure that an interpreter was present and would fund the cost. I asked Ms Popal to indicate how the absence of an interpreter at this error of law hearing would lead to unfairness on the part of the appellant. I asked her to provide me with a practical example also of how the hearing would be unfair given that Ms Popal indicated that she had no intention of going beyond the grounds of appeal that had already been submitted and the skeleton argument that was submitted on the day of the hearing. Ms Popal indicated that the appellant's understanding of English was very limited and that she had been unable in conference to properly take any instructions. Her instructing solicitor had not provided an interpreter today to enable her to have a conference with her client prior to the commencement of this hearing. In essence Ms Popal's submissions were that this is the appellant's appeal, he has a right to participate which means that he should be able to understand what is happening during the course of the hearing and to understand what is being said on his behalf. She submitted that the appellant has paid the cost of instructing Counsel in this case and he wishes to have an interpreter available. She submitted that it was in the interests of justice that an appellant can participate in his hearing by understanding what is happening at the hearing.

9. I invited submissions from Mr Diwnycz. He submitted that no application for an interpreter had been made and that it was not the duty of the Tribunal to provide an interpreter for an error of law hearing. He submitted that even if the appellant was able to speak English to an appropriate standard he might not understand all the legal concepts that are discussed in a court in any event.
10. I refused the application for an adjournment. Directions had been served on the appellant's representative. At paragraph 8 it is clearly directed that any request for the services of an interpreter must be made to the Tribunal in writing at latest 7 days before the hearing. Despite the initial assurances that such an application had been made none had been made. Whilst an appellant should be enabled to understand proceedings in this case full grounds of appeal and a skeleton argument had been submitted and it was confirmed that he was aware of the content of those documents. Ms Popal had no intention of adding to what was set out therein beyond the usual amplification. The overriding objective is to ensure that cases are dealt with fairly and justly which includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. The unfairness that Ms Popal identified if I were to proceed was that the appellant could not participate fully as he could not understand the proceedings. This was an error of law hearing. Full instructions had been taken. The appellant's instructing solicitor had not arranged for an interpreter to attend to assist Ms Popal with taking any

further instructions should they have been necessary on the morning of the hearing. There was no new material that Ms Popal intended to raise. Most significantly the appellant's representative had not made an application for an interpreter to be present despite the clear directions given. There is also a need to avoid unnecessary delay. Taking all these factors into account I considered that the appellant would not be unduly prejudiced by failing to understand what was being said at the hearing and that by proceeding the hearing would still be fair. He was fully aware of the points that were being made on his behalf, he was not going to be asked to give evidence and it was very unlikely that he would be asked to clarify any matters. His participation was limited to understanding what was being said in submissions.

## **Submissions**

11. Ms Popal took me through the First-tier Tribunal's decision. She submitted that the First-tier Tribunal had applied the wrong standard of proof. In paragraph 9 of the decision the First-tier Tribunal set out that the standard of proof was a reasonable degree of likelihood. She submitted that it was the wrong standard. The standard is a low standard. It has to be more than merely fanciful. She referred to paragraph 16 of the decision and said that the judge finds that the appellant's account is implausible. The difficulty with that assessment is that the judge had failed to correctly assess the appellant's account. She referred to the Home Office Guidance API on Sexual Orientation in Asylum Claims which states at page 13:

"Recognising, understanding and accepting one's own sexual orientation, if it differs from mainstream social expectations, can be a long and/or painful process, and in some instances, may only come in later stages of life. In such cases this must not be seen as undermining the genuineness of an individual's claim. Many claimants may come from cultures which shun any open discussion on sexual orientation and it should be noted that LGB activity and identity will often be surrounded by taboo, stereotypes and prejudice and be seen as being contrary to the fundamental morals, religious and political values of many societies. Discussing matters such as sexual orientation will for many, in the official context of an asylum interview, be extremely daunting. It is to be expected that some LGB asylum seekers may struggle to talk openly about their sexual orientation. If find it difficult to disclose material information in a coherent or detailed manner."

12. She submitted that when considering the appellant's credibility the judge should have had regard to the entirety of the claim, the specificity of detail, consistency and corroborating evidence supplied by the appellant. The starting point when considering sexual orientation is self-identification. It is clear in this instance the appellant identifies as gay and he has done so for a significant period of his life. The judge failed to take any of this into account and simply applied an objective test as opposed to self-identification. Reference is made to the case of **NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856** which made it clear that what is relevant is current identity. The key consideration must be focused on assessing the current sexual orientation

of the claimant. It submitted that had the judge applied the proper test and weight when assessing credibility the judge would have determined that the appellant would be at a real risk of persecution as outlined in the case of **HJ (Iran) and HT (Cameroon)**. She submitted that the case law indicates that the history is not indicative of sexual orientation. Many people may continue in heterosexual relationships but realise only later that they are gay. The judge makes no findings and does not take into account how people would express themselves in homophobic societies. She submitted a person from that background would struggle.

13. With regard to the requirement for corroborative evidence she submitted that it was perverse for the judge to require that the appellant had witness evidence from his mother and friends. She asserted that the Secretary of State would argue in such circumstances that such evidence was merely self-serving. She referred to the judge's reliance on the case of **TK (Burundi) [2009] EWCA Civ 40** and submitted that this is confined to cases where there is documentary evidence and there is no good reason why that documentary evidence has not been provided. The judge has erroneously stated that the appellant has failed to give a detailed account. The appellant could still be gay and never have had a boyfriend. This does not mean that it cannot be accepted that he is gay. She submitted the judge has disregarded the guidance and case law.
14. Mr Diwnycz relied on the Rule 24 response and submitted that the decision was within the spectrum available to the judge. He submitted that in the **TK (Burundi)** case this is extended beyond mere documentary evidence. He referred to paragraph 16 of the First-tier Tribunal decision and submitted that Judge Callow did not take the point against the appellant that there is no documentary evidence. He submitted that the appellant has not given any reason why he has not called any witnesses. He submitted that the appellant's evidence was inconsistent and vague and that is what has sunk his credibility, not the lack of any corroborative evidence. He submitted that the judge is bound by law notwithstanding any Home Office guidance. The decision is one that was open to him.
15. In reply Ms Popal submitted that **TK (Burundi)** is limited to objective evidence where there is no cogent reason given as to why that evidence is available and it expressly states that it refers to independent evidence. The evidence of his mother and friends would be unlikely to be considered to be independent evidence. The judge has not applied the Home Office guidance and had no regard to it.

## **Discussion**

16. The First-tier Tribunal Judge correctly sets out in paragraph 10 the approach to be adopted when considering a claim that an appellant is gay as per **HJ (Iran) and HT (Cameroon)**. In paragraphs 11 and 12 the First-tier Tribunal considers the case of **Minister voor Immigratie en exilē [2013] EUECJ C-199/12** concerning criminalisation of homosexual acts and the case of **A, B and C** which set out that in the context of assessing an asylum claim based on fear of persecution on grounds of sexual

orientation *'must be interpreted as precluding... the competent national authorities from finding that the statements of the appellant for asylum lacked credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.'*

17. It is clear that the judge was well aware that there was a need for caution where a claim based on sexuality is not raised at the first opportunity. The judge made the following findings:

“13. It is necessary to make a finding concerning the evidence of the appellant. I have made such a finding only after mature consideration of all relevant and material circumstances. In making this finding I have taken into account all the available evidence, in the round, and have attached such weight as I consider, after anxious scrutiny, to be properly attributable thereto. The reasons for my finding are set out in the following examination of factors material to the finding. The order in which I address the factors is not indicative of any relative amount of weight attached to them, but it adopted purely for convenience of exposition.

14. In respect of the exercise of assessment of credibility of the appellant, I make mention of the provisions of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, with which I have complied.

15. The credibility of the appellant is affected by his immigration history and the sequence of events leading to his claim for asylum. This history shows a course of conduct not consistent with that reasonably to be expected from a person genuinely in need of international protection. Since his arrival in the UK the appellant failed to claim asylum timeously and only did so after he was served with an administrative removal order as an overstayer on 27 June 2016. Had he not been served with such an order he might never have made a claim for asylum. Despite being aware of the right to claim asylum founded on his sexuality by about 2011 or 2012, it was only after the rejection of a human rights claim founded on a family and private life established in the UK and the service of the said administrative removal order, that some two months later he made his asylum claim founded on his sexuality. In giving his evidence at the hearing of the appeal, the appellant was vague and inconsistent about the details of his claimed relationships, not only the one in Bangladesh but the two in the UK, the last of which appeared to have ended some time ago.”

18. The judge is entitled to consider the immigration history of the appellant and to find, on the facts of this case that it weighs against the appellant's account. The appellant had been in the UK for 14 years, had made an application for leave to remain on the basis of family and private life which was refused in 2014, was served with removal papers almost 2 years later and only then made a claim for asylum despite being aware that he had a right to claim asylum around 2011/12. However, it is not merely as a result of the failure to declare his sexual orientation on the first occasion that the judge does not accept his evidence, this was only one factor. As set out

above the judge found that in giving his evidence at the appeal he was vague and inconsistent. The judge further set out:

“16. The appellant was implausible. The core details of his claim are not credible and have belatedly been made up. In *R (on the application of JB (Jamaica)) [2013] EWCA Civ 666, [2014] Imm AR 1* it was held at paragraph 29, ‘Homosexuality is a characteristic that cannot be reliably established without evidence from sources external to the claimant himself’. The appellant failed to call his mother and friends to give evidence as to his sexuality. In context, I draw on the guidance in *TK (Burundi) [2009] EWCA Civ 40; [2009] Imm AR 3 at 488* in which it was held that it was important for independent supporting evidence to be provided where it would ordinarily be available. Where there was no credible explanation for the failure to produce such supporting evidence, it could be a very strong pointer that the account being given was not credible.

17. It is in these circumstances when addressing the first question in *HJ (Iran; HT (Cameroon))*:

‘...when an applicant applied for asylum on the ground of a well-founded fear of persecution because he was gay, the Tribunal must first ask itself whether it was satisfied that he was gay, or that he would be treated as gay by potential persecutors in his country of nationality...’

that I have reached the conclusion that the appellant has not established he is gay or that he would be treated as such by potential persecutors in his home country. Accordingly, his appeal fails.”

19. These paragraphs must be read in light of the oral evidence set out by the judge (at paragraph 7) and the extensive questions from his asylum interview set out in paragraph 5 containing several questions that were asked of the appellant. When these questions and the answers given are considered together with the oral evidence it is immediately apparent that there is a marked lack of detail in the appellant’s evidence.

20. I reject Ms Popal’s submission that **TK (Burundi)** is limited to objective evidence where there is no cogent reason given as to why that evidence is available. That case concerned a lack of supporting evidence from the mothers of the appellant’s children and evidence of payments made to support the children. The court held:

“20. The importance of the evidence that emerged in this Court is to demonstrate how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; that where there is no credible explanation for the failure to produce that supporting evidence it can be a very strong pointer that the account being given is not credible. It is clear in the circumstances of this case that the Judge was in fact right to disbelieve the appellant. If the appellant had asked the mother of his second child, Ms N to give evidence, the truth about her immigration status would have emerged and his claim to base an entitlement to family life on his relationship with her and the child by her would have failed. That that was the inevitable consequence was made clear by the fact that his counsel accepted before us that he could no longer



rely upon the relationship with Ms N and her daughter and the sole ground on which an Article 8 claim could be advanced was the relationship to his daughter by his first partner.

21. The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

21. It is clear that the reference to independent evidence includes witness evidence from those in relationships, including family, with an appellant. The judge was entitled to take into account the absence of such evidence in rejecting the appellant's account.
22. There was no implicit requirement for photographic evidence as averred.
23. As set out in the above paragraphs from the First-tier Tribunal's decision the judge has considered the appellant's case individually. It is asserted that the starting point when considering sexual orientation is self-identification. However, as the judge set out a finding must be made. This can only be made after considering the evidence not simply on the basis that an appellant says he is gay. The judge has not applied an objective test. He has considered all the evidence but was not convinced that the appellant was homosexual.
24. At paragraph 9 regarding the burden of proof the First-tier Tribunal Judge set out:
  - "9. I bear in mind the incidence and standard of the burden of proof. It is for the appellant to establish to a reasonable degree of likelihood that his professional fear of persecution for a Convention reason is well-founded, with the investigation of both past events and the likelihood of prospective harm being undertaken as a single exercise rather than in two stages, and the standard being applied to the evidence as a whole rather than to each evidential issue....".
25. The grounds of appeal assert that the judge expected a higher standard of proof without following the **Sivakumaran** guidelines of a lower standard of proof. The expression 'reasonable degree of likelihood' to describe the lower standard of proof in asylum claims is a common formulation and is in fact taken from the case of **R v SSHD ex p. Sivakumaran (1998)AC 958** , where it was held that the existence of a well-founded fear of persecution required the establishment of what was described by Lord Keith of Kinkel as "a reasonable degree of likelihood".
26. There is nothing in the skeleton argument or the summary of the submissions to indicate that the First-tier Tribunal was asked to consider

any risk to the appellant based on return as a failed asylum seeker who had claimed asylum on the basis of homosexuality. No objective evidence was referred to support such a claim. It is not clear how the authorities would become aware of this information.

27. For the reasons set out above the conclusions reached by the judge were ones that were open to him. The findings reached were not irrational or perverse. There were no material errors of law in the First-tier Tribunal decision such that the decision should be set aside.

### **Notice of Decision**

The appeal is dismissed. The decision of the Secretary of State stands.

Signed P M Ramshaw

Date 14 November 2017

Deputy Upper Tribunal Judge Ramshaw