



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/08839/2016

Appeal Number:

THE IMMIGRATION ACTS

Heard at North Shields

**Determination
Promulgated**

On 12 December 2017

On 14 December 2017

Prepared on 13 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

**M. A.
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Adams, Counsel, instructed by Charles
Simmons Immigration Solicitors

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant entered the UK lawfully on 15 November 2006 as a working holidaymaker, following a successful appeal to the Tribunal against a refusal of entry

clearance. He became an overstayer on 30 October 2008.

2. On 30 November 2012 the Appellant attempted to apply for a grant of leave to remain, which application was rejected as invalid on 16 January 2013. He made an application on 1 February 2013, which was refused on 15 April 2013, with no right of appeal.
3. On 26 January 2016 the Appellant was interviewed by the Respondent as to how he came to be in the UK [F1]. He admitted that upon entry as a working holidaymaker he had no intention of returning to Bangladesh. He made no claim to asylum at this point.
4. On 9 February 2016 the Appellant instructed his current solicitors [H5]. On 15 February 2016 the Appellant claimed asylum, on the basis of his sexuality, and he was served with a notice under s120 of the 2002 Act; the "one stop notice" [H6].
5. In response the Appellant's solicitors wrote to the Respondent on 22 February 2016 to set out his instructions upon the detail of his claim to protection [H1-], and he was in due course interviewed on 9 June 2016 [B1-]. That interview prompted a further letter from his solicitors, dated 16 June 2016, setting out his claim once again [H11-].
6. The Respondent refused the protection claim on 15 August 2016, and the Appellant's appeal to the First tier Tribunal against that refusal was heard on 26 April 2017. It was dismissed on all grounds by decision of First tier Tribunal Judge Fox promulgated on 12 June 2017.
7. The Appellant was granted permission to appeal by decision of First tier Tribunal Judge Black on 18 October 2017 on all the grounds advanced.
8. The Appellant filed a Rule 24 notice on 3 November 2017, arguing that the Judge was entitled to conclude that the Appellant had not told the truth about the core of his protection claim, and had given adequate reasons for doing so. Moreover, given there was no Article 8 claim advanced at the hearing, the Judge could have made no material error in his treatment of s117A-B of the 2002 Act.
9. Thus the matter comes before me.

Error of Law?

10. Neither Ms Adams, who did not appear below, nor Counsel who did appear below are the authors of the

grounds to the application for permission. Those grounds are not well drafted, as Ms Adams readily accepted. She sought to distil from them three complaints as set out in her skeleton argument. Thus, she argued; (a) there was a failure to make a relevant finding of fact, (b) the Judge's approach to the credibility of the Appellant was fatally flawed, because it displayed a pre-determination that his evidence was untrue, and, (c) there was a failure to deal with the Appellant's Article 8 case.

11. No evidence has been filed in support of the application for permission to appeal from either the Appellant, Counsel, or any other person in attendance at the hearing before Judge Fox to suggest that in the course of his decision he misapprehended anything said to him at that hearing in the course of submissions made on behalf of the Appellant, or, that he had incorrectly recorded the oral evidence given to him. In any event the grounds do not, in terms, assert that he did so.

Failure to make a relevant finding of fact?

12. It is clear, notwithstanding the assertion to the contrary to be found in the grounds of the application for permission to appeal [iv-vi], that the Judge did make a clear finding that the Appellant was not homosexual as he claimed to be [34]. Before me Ms Adams accepted as much.
13. Ms Adams advanced the argument that the Judge had however failed to make a clear finding upon whether the Appellant had nevertheless created the impression with members of his family that he was homosexual, so that they in any event perceived him to be homosexual, with the result that he was at real risk of harm from them (or others) upon return to Bangladesh.
14. It is difficult to see any merit in this complaint for two reasons. First, the evidence that the Appellant relied upon before the Judge was not that his family proposed to harm him, but that they had in early 2016 disowned him upon learning of his activities in the UK- a quite different matter. The Affidavit, said to have been made by his mother on 30 March 2016, asserted that the family had "*recently learnt from a reliable source that he has been passing immoral life disposing and deserting the Islamic lifestyle, even doing various illegal activity*" [I1]. Moreover in his witness statement of 19 April 2017 [ApBp4 #15] the Appellant asserted no risk of harm from any member of his family, but merely said

that after he had refused pressure to change his sexuality he had been disowned.

15. Second, the Judge noted, correctly, that the Appellant's case over what his family had learned, and when, was inconsistent. Thus his instructions, as set out in his solicitor's letter of 22 February 2016 [H1], were that he had kept his sexuality a secret until he had made a recent disclosure of it to them in response to pressure to marry. Those instructions are not obviously consistent with the contents of the Affidavit said to have been made by his mother. More fundamentally, as the Judge noted, his case that his family had only learned of his sexuality nine years after he had left Bangladesh was not consistent with his claim that they had actually learned of his homosexuality before he had left Bangladesh in 2006. As the Judge noted [29] the Appellant's evidence upon this aspect of his case lacked credibility.
16. In my judgement the decision must be read as a whole, without overly forensic dissection, and when that is done it is plain that the Judge not only rejected the claim that the Appellant was in truth a homosexual, but also rejected the claim that he was genuinely perceived to be a homosexual by anyone, whether his family, or members of the general public in Bangladesh.
17. To the extent that it was argued that the Appellant was perceived as a homosexual by members of the wider public in Bangladesh, beyond his former sexual partners, and that the Judge failed to make a relevant finding upon this claim - this is in my judgement dealt with by the Judge's clear finding that the Appellant is not a homosexual, and his clear finding that the Appellant's account of his past homosexual experiences is a fiction. Thus, although the Appellant had claimed that his identity as a homosexual had become widely known in Bangladesh (leading to a risk of prosecution by the authorities and persecution by members of the public) when a former sexual partner had disclosed the Appellant's identity as a former sexual partner as part of his efforts to obtain a more lenient sentence from the court in Bangladesh; that claim was in my judgement quite clearly rejected by the Judge as untrue [33].
18. To the extent that it was argued before me that the Judge failed to consider whether the Appellant could be at risk of harm upon return to Bangladesh because some currently perceive him, wrongly, to be homosexual, I note simply that this was never his case. In any event the Judge's rejection of the Appellant's evidence as

untrue disposes in my judgement of even this lately identified proposition.

Failure to adopt an appropriate approach to credibility?

19. The focus of Ms Adams' argument therefore fell upon whether the Judge's approach to the assessment of the evidence before him was flawed to such an extent that it rendered his adverse credibility decisions unsafe, so that the decision had to be set aside and reheard.
20. Ms Adams argued that the Judge took into account immaterial matters; (i) the Appellant's failure to give details of how he managed to have heterosexual sexual partners at the age of 16-17, and, (ii) the Appellant's failure to give a consistent and detailed account of his own developing appreciation of his homosexuality. This argument does not form part of the grounds for the application for permission to appeal, but for the sake of completeness I shall deal with it nonetheless. In my judgement there is no merit in this complaint. The Judge had the benefit of hearing the Appellant give evidence, and he was entitled to place that evidence within its proper context, namely the Appellant's childhood within a Muslim society. If the Appellant was claiming to be able to pursue sexual relationships with girls at the age of 16 in Bangladesh it fell to him to explain how those opportunities had arisen, and had been pursued. It was plainly relevant to a consideration of the credibility of the Appellant's evidence of his developing appreciation of his sexuality, to identify whether he was telling the truth about his past sexual experiences, and to consider how, when, and in what circumstances he had come to the conclusion that he was homosexual. The Judge directed himself adequately to consider that the Appellant might face difficulties in giving detail through shyness, but correctly balanced that with the Appellant's own assertion that he was now living an openly gay lifestyle [23-24].
21. Ms Adams' second argument, which is ventilated in the grounds, was that the manner in which the decision was written, and in particular the order in which its several passages were presented was sufficient to demonstrate that the Judge had pre-determined that the Appellant was advancing a false claim, prior to undertaking any assessment of the evidence upon which he relied. In advancing that argument she pointed to paragraphs 14-17 of the decision, which she argued stood together as a pre-determination of the Appellant as a false witness,

placed as they are prior to the assessment of the evidence undertaken in paragraphs 18-37. She relied upon the guidance to be found in JT (Cameroon) [2008] EWCA Civ 878, and argued that the manner in which the decision had been written disclosed that the Judge had regarded s8 as being determinative of the Appellant's credibility, rather than as simply one of the matters to be taken into account as part of the global assessment of the credibility of the differing elements of the evidence before him.

22. The mere fact that the Judge placed the contents of paragraph 16 of his decision in advance of the extensive assessment of the evidence that he then undertook in paragraphs 18-36 does not in my judgement disclose, of itself, a pre-determination of the appeal prior to consideration of that evidence. Any Judge must start somewhere in writing their decision, and many do so with a rehearsal of the immigration history in order to set into its proper context the decision that led to the appeal before them. It is a natural consequence of so doing that many commence the assessment of the evidence with a consideration of whether the s8 issues raised by that history are to be considered material, or not. Of itself, such an approach discloses no error of law, as indeed Pill LJ accepted in JT.

I do not regard the positioning of the section 8 reference in the determination as necessarily fatal. I do, however, agree with the parties that there is a real risk that section 8 matters were given a status and a compartment of their own rather than taken into account, as they shall have been, as part of a global assessment of credibility

23. Thus I reject Ms Adams' primary submission that the mere location of the assessment of s8 issues within the decision was determinative. Mere placement of reference to s8 issues within the decision at the beginning of the assessment of evidence will not of itself give rise to an error of law.
24. In my judgement the following passage from JT is also instructive;

Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters

when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder.

25. Accordingly, in my judgement, one can see that a Judge will only fall into error in the use of s8, if the language used, in the context of the decision when read as a whole, gives rise to the conclusion that s8 has been used as determinative of the credibility of the evidence at the core of the appeal, rather than as part of the overall assessment.
26. Thus Ms Adams argued that the exercise which she accepted had been undertaken by the Judge in paragraphs 18-36 of the decision was immaterial, because the decision read as a whole disclosed that the Appellant's evidence had already been rejected by the Judge as untrue in the course of paragraph 16. I reject that argument; it is plain in my judgement that the Judge was seeking to conduct an overall assessment of the evidence, looking at different aspects of the appeal in turn, before drawing his thinking and his conclusions, together in paragraphs 34-37. Nor is it easy to follow an argument that this decision displays the predetermination argued for, in the light of the acceptance by Ms Adams that it would have been open to the Judge to state simply at the outset of his findings that he rejected the Appellant's evidence as untrue and then to go on to give his findings for that decision, as indeed some styles of decision writing do.
27. I should perhaps confirm that in my judgement the Judge was in this case entirely justified in the assessment he expressed at the conclusion of paragraph 16 that s8 of the 2002 Act should be applied to the evidence before him, in the light of the Appellant's behaviour and immigration history. That assessment was not only open to him, but it mattered not whether he placed it at the beginning of his assessment of the evidence, or at the end. It did not matter, because the key question was not where he

chose to locate this assessment within the text of the decision as a whole. On the contrary, the key question was whether the Judge's decision when read as a whole demonstrated that he did undertake the proper and careful assessment that was required of him of the weight that could be given to the evidence. In my judgement Ms Adams' argument was reduced to the assertion that the exercise undertaken by the Judge in paragraphs 18-36 was a sterile one, because in reality the Judge had already rejected that evidence as incredible in the light of the immigration history. It is however plain in my judgement that this was not the Judge's approach.

28. Nor did Ms Adams' argument gain any extra force in my judgement from the location of paragraph 15 within the decision, which paragraph contains a rehearsal of issues raised by s117 of the 2002 Act. I accept that the location of this passage at this point in the decision made no obvious sense, and given the Judge's self direction in paragraph 46 that no Article 8 claim was advanced, it is far from clear why he included it at all. References to s117 were quite simply unnecessary. However its existence does not of itself demonstrate, either alone, or in conjunction with the placement and content of paragraph 16 that the Judge had rejected the Appellant's evidence as not credible prior to undertaking an assessment of that evidence. I am not satisfied that he did.

Failure to deal with the Article 8 ground of appeal?

29. Under the heading "grounds of appeal" to the Notice of Appeal the Appellant did not raise Article 8, the text stated instead that the Appellant did not have a private or family life for the purposes of Article 8. It is true that this was followed immediately thereafter under the heading, "*statement of additional grounds*" with text which contradicted the foregoing in bald terms, with the simple assertion that removal would interfere with his family and private life. No details of any such claim were however identified. It is very far from clear what the author of this document sought to achieve by these passages, or what he intended either the Respondent or the Tribunal to make of a case presented in this way.
30. The Judge's decision recorded that there was no claim made before him under Article 8, and no claim that the Appellant met the requirements of the Immigration Rules [46]. Although Ms Adams told me that she was

instructed to argue that this was not what had occurred at the hearing, as noted above, she had already accepted that no evidence had been filed in support of the application for permission to appeal to suggest that the Judge had misrepresented or misunderstood what had been said to him during the course of the hearing by either the Appellant, or experienced Counsel appearing on his behalf.

31. The grounds of the application for permission to appeal assert at (xi) that the Judge had accepted that the Appellant had established a “private life” with his family and friends, and that he had concluded that refusal of leave to remain would interfere with his Article 8 rights, but that it was nevertheless proportionate. This passage not only fails to identify any error of law, but it entirely fails to engage properly with what the Judge did say on the subject of Article 8, with the result that it materially misrepresented the relevant passage in the decision. Ms Adams (who was not the author of this document) could offer no explanation for how this came to be.
32. Notwithstanding these deficiencies Ms Adams was instructed to argue that the Judge failed to give proper and adequate consideration to the Appellant’s Article 8 claim. When I enquired what her instructions were as to the substance of the claim that had been advanced, the response was that the Appellant had established a “family life” in the UK. That cannot have been the case. The Appellant did not assert to the Judge that he was in a durable relationship with any individual in the UK that could amount to “family life”. When I pointed this out to her, Ms Adams suggested that the Appellant had a “family life” with relatives living in the UK, who supported him. That was in my judgement a proposition that lacked any adequate evidential foundation, indeed it was entirely inconsistent with one version of the evidence that had been placed before the Judge. Indeed, to her credit, Ms Adams accepted as much once the Appellant’s witness statement for the appeal had been examined.
33. Taken at its highest therefore the position before the Judge was that the Appellant, a 39 year old adult at the date of the hearing had left his parents and siblings in Bangladesh upon emigration to the UK. He had accepted in 2016 to the Respondent that far from being a working holidaymaker he had never intended to return to Bangladesh, and indeed he had remained in the UK illegally for nine years upon the expiry of that visa. He identified no relative in the UK in his witness statement

for the appeal [ApBp4], and none gave evidence on his behalf. His original case as placed before the Judge in his written evidence was that his extended family in the UK had disowned him, as had his family in Bangladesh [ApBp5 #21]. His inconsistent oral evidence to the Judge had been that family members in the UK supported him. That inconsistency was one of the reasons relied upon by the Judge for rejecting his evidence upon the asylum appeal as untrue [25]. Even if he was “supported” to some extent by unidentified family members in the UK, he had left entirely unexplained what the nature of that support was, and who was providing it. That evidence could not in my judgement have established the existence of “family life” for the purposes of Article 8 either in principle, or, of a nature and strength that would engage Article 8.

34. At best therefore the only Article 8 argument open to the Appellant at the hearing of the appeal was that he had established a “private life” in the UK, whilst present illegally, that was of such a nature and strength that it not only engaged Article 8, but rendered disproportionate the public interest in his removal. Such an argument faced the difficulty that the Judge had rejected as untrue the Appellant’s evidence concerning an openly gay lifestyle, and his homosexuality. What then was left in his evidence of an explanation as to how he lived his life? The Appellant’s witness statement offered no more than his physical presence in the UK, as an explanation for that “private life”. There was no explanation of how he actually spent his time, or, of how he supported himself. In my judgement therefore the evidence placed before the Judge entirely failed to demonstrate the existence of a “private life” that would engage Article 8. Even if it could do so, in the light of the low threshold of engagement, the Judge would have been obliged to take account of the undeniable fact that this lifestyle was established by him at a time when he was present in the UK illegally. Absent any credible evidence of third party support that catered for all of the Appellant’s needs (none being offered) the only available inference would be that he had been supporting himself by working illegally in the UK. No friend gave evidence on his behalf, and no organisation suggested that his presence in the UK was to the benefit of the public. No Tribunal properly directing itself in accordance with the current jurisdiction could have concluded that these personal circumstances rendered his removal disproportionate.

35. For all of the above reasons it follows that I am not satisfied that the Judge made any error when he recorded that experienced Counsel appearing before him had advanced no Article 8 claim. Notwithstanding the problems with the way in which the grounds of appeal had been presented, and leaving them to one side, since it is well arguable that the grounds of appeal expressly disavowed reliance upon Article 8, there is nothing to suggest that such a ground of appeal ever had any merit. No doubt both Counsel, and the Judge, recognised the reality of that state of affairs, and the Judge felt no need to set out the reasons for it in full. His failure to do so discloses no arguable error of law. I have only been obliged to do so because of the manner in which Ms Adams has been instructed to advance the appeal.

Conclusion

36. In the circumstances I am satisfied that notwithstanding the grant of permission the grounds identify no arguable material error of law. The Judge's decision to dismiss the appeal on all grounds must therefore stand.

DECISION

The Decision of the First Tier Tribunal which was promulgated on 12 June 2017 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. That decision is accordingly confirmed.

Deputy Upper Tribunal Judge JM Holmes
Dated 13 December 2017

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 13 December 2017