



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

Appeal Number: PA/08990/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28<sup>th</sup> March 2018**

**Decision &  
Promulgated  
On 17<sup>th</sup> April 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MD TORIQUL [I]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr E Anyene, Counsel

For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Bangladesh born on [ ] 1987. The Appellant arrived in the United Kingdom on 12<sup>th</sup> November 2009 and claimed asylum on 24<sup>th</sup> February 2017. From the period 16<sup>th</sup> April 2011 to 17<sup>th</sup> April 2012 the Appellant was validly in this country under a Tier 4 Student visa. His application for a further visa in December 2014 was refused and consequently since that date and indeed since April 2012 he had been an overstayer.

2. On 24<sup>th</sup> February 2017 the Appellant made an application for asylum and a claim for human rights. The basis for that claim was that he was a member of a particular social group namely a gay man and he also contended that removing him to Bangladesh or requiring him to leave the UK would be a breach of his Article 8 ECHR rights because he had been in the UK for seven years and nine months. That application was refused by Notice of Refusal issued in August 2017.
3. The Appellant lodged Grounds of Appeal to the Upper Tribunal and the appeal came before Judge of the First-tier Tribunal Chohan sitting at Birmingham on 13<sup>th</sup> October 2017. In a decision and reasons promulgated on 27<sup>th</sup> October 2017 the Appellant's appeal was dismissed on all grounds.
4. On 10<sup>th</sup> November 2017 Grounds of Appeal were lodged to the Upper Tribunal. On 11<sup>th</sup> December 2017 Judge of the First-tier Tribunal Bird granted permission to appeal. Judge Bird noted that the Appellant sought permission to appeal on the grounds that the judge had failed to adequately consider the evidence and had failed further to give reasons for the finding that he made. It was alleged that the judge in finding that the Appellant was not credible when he gave approximate dates for when he began to realise his sexuality, made an arguable error of law in failing to give reasons why this evidence was not credible. Further, it was alleged that at paragraph 12 the judge had asserted that the Appellant would have been more certain about his feelings had he been a "genuine homosexual" but again gave no reason for this assertion. The grounds asserted that this was pure speculation on the part of the judge on a matter for which he had no direct knowledge.
5. Judge Bird concluded that it was arguable that in failing to give reasons why the Appellant was not credible when he said that the acceptance of his sexuality was a gradual process the judge had made an arguable error of law. Further Judge Bird noted that it was alleged by the Appellant that the judge had failed to give adequate reasons for disregarding the evidence of the two witnesses who were called and that the judge's decision that the evidence was "just bold statements" did not deal with the evidence that he heard and that it was arguable that in failing to give adequate reasons for dismissing the evidence of the two witnesses the judge had made an arguable error of law.
6. On 25<sup>th</sup> January 2018 the Secretary of State responded to the Grounds of Appeal under Rule 24. That Rule 24 response submits that the judge made adequate findings of fact and gave adequate reasons for the findings made, as set out at paragraphs 10 to 18, and that the judge had adequately considered the evidence from the two witnesses and found that it was self-serving. Further the Rule 24 reply notes that the judge had concluded that there was no evidence from gay clubs that the Appellant claimed to have attended.
7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier

Tribunal Judge. The Appellant appears by his instructed Counsel Mr Anyene and the Secretary of State appears by her Home Office Presenting Officer Mr Duffy.

### **Submissions/Discussions**

8. Mr Anyene relies on the Grounds of Appeal. He states that the judge has made a number of misdirections firstly, in that he has failed to consider the evidence where at paragraphs 10 to 13 the judge refers to the Appellant's evidence about becoming aware of his sexuality and suggested that it was confused and inconsistent. He asked me to look at paragraphs 12 and 13 of the judge's decision and submits that the judge has rejected the Appellant's claim without engaging with the evidence. He contends that the judge has at any stage failed to direct himself that insofar as the Appellant had referred to being 13 or 14 and 15 or 16 he was giving inevitably approximate dates for what was likely to have been a gradual process rather than "a sudden flash of insight", and since he was 30 at the date of hearing he was referring to events many years before. In those circumstances it is submitted a degree of uncertainty or imprecision was not merely unremarkable but positively to be expected and that the adverse inference drawn was unjustifiable. Mr Anyene notes that at paragraph 12 the judge had asserted that the Appellant would have been more certain about his feelings had he been a genuine homosexual and submits that there is no basis supplied for this assertion and no account taken into account has been made of the cultural and religious background with its marked homophobia in which the Appellant was raised. It is submitted that this was pure speculation on the judge's part on a matter of which he had no direct knowledge and had no place in his determination.
9. Mr Duffy concedes that the challenge made herein is a perversity challenge and that it may have some merit. He accepts that there is a high threshold to be reached by the Appellant but that the Secretary of State would not be surprised if that threshold had in fact been reached.
10. There are two further Grounds of Appeal firstly, that the judge has failed to consider evidence and give reasons relating to the Appellant's evidence about his relationships in the United Kingdom and that the judge had attached weight to the absence of evidence from any of the Appellant's sexual partners. It is submitted in so approaching the matter the judge had failed to consider either that sexually explicit evidence should not be required or considered in claims of homosexuality or that there might be many reasons why such partners, particularly if the relationships had been casual, would be unwilling to come forward and testify openly.
11. Further the judge had referred at paragraph 17 to the delay in claiming asylum but appears to have included in this period from the Appellant's arrival in 2009 given his express rejection of the evidence that the Appellant did not know then about asylum and ignore the evidence to which he said he attached importance that the Appellant had not

experienced problems in Bangladesh. Consequently, it was submitted that the judge had failed to direct himself or consider that the Appellant would have no reason to consider claiming asylum until he became aware that his sexuality would put him at risk in Bangladesh and if he had suffered no difficulties whilst there it was not obvious when that would have occurred. That being so before weight could be attached to delay in claiming asylum, it was necessary for careful consideration to be given by the judge and findings made about when the Appellant might reasonably have been expected to make his claim and thus the extent of the delay.

## **The Law**

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Findings on Error of Law**

14. It is Mr Anyene's submission that the judge's findings are not only perverse but he has failed to give reasons for making his findings. Mr Duffy in response has accepted that this is a perversity challenge and that the threshold may well have been reached but it may well be that the Tribunal should be looking at this matter as if it were a mere discrepancy.
15. The key paragraphs are paragraphs 12 to 13 of the decision. Therein the judge appears to have made findings which, as is submitted to me by Mr Anyene, sets the judge out as being an expert on homosexuality. He submits that the failure of the judge to give proper reasons and to make findings in the manner in which he has done namely, to expect the Appellant to have been more precise about his homosexual feelings and

when he realised he was a homosexual, is so perverse that the decision should be not only found to have contained an error of law but should be remade.

16. Whilst Mr Duffy does not rein hard against the finding that there is an error of law which is material, he does argue strongly against there being a finding that this case should be merely remade allowing it. For all the above reasons in particular the findings made without reasons by the judge with regard to the decision that he did not believe the Appellant's version of events, I find that the judge has imposed his own stance and consequently that the decision is effectively perverse and discloses a material error of law. However, the finding is a credibility finding and a proper approach to credibility would require an assessment of the evidence and of the general claim. This could include the internal consistency of the claim, the inherent plausibility of the claim and the consistency of the claim with external factors of the sort to be found in country guidance. Whilst I acknowledge that theoretically a claimant need do no more than state his claim that claim still needs to be examined for its consistency and inherent plausibility. In such circumstances I agree with the view expressed by Mr Duffy that this cannot be a case where credibility is automatically accepted but that the finding on credibility is unsafe. In such circumstances the correct approach is to find a material error of law in the decision of the First-tier Tribunal Judge and to remit the matter back to the First-tier Tribunal for rehearing.

### **Decision and Reasons**

17. The decision of the First-tier Tribunal discloses a material error of law and is set aside. Directions are given below for the rehearing of this matter.
- (i) That on the finding that there is a material error of law in the decision of the First-tier Tribunal the decision is set aside with none of the findings of fact to stand.
  - (ii) That the appeal is remitted to the First-tier Tribunal sitting at Birmingham on the first available date 28 days hence to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Chohan.
  - (iii) That the estimated length of hearing be three hours.
  - (iv) That there be leave to either party to file and serve an up-to-date bundle of both objective and/or subjective evidence upon which they seek to rely at least seven days prior to the restored hearing.
  - (v) That it is not envisaged that the Appellant will require an interpreter but if he does then his instructed solicitors must notify the Tribunal within seven days of receipt of these directions.
18. No anonymity direction is made.

Signed

Date 16 April 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 16 April 2018

Deputy Upper Tribunal Judge D N Harris