Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09170/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 July 2019	**On 17 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

A B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Eaton, Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant in this appeal is a citizen of Albania born on 10 August 1990. He appeals with the permission of the First-tier Tribunal against a decision of Judge the First-tier Tribunal M B Hussain, dated 13 April 2019, in which he dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds against the decision of the respondent made on 9 July 2018.

2. The background to this appeal is that the appellant entered the United Kingdom with leave to enter as a Tier 5 religious migrant which was originally valid until 22 April 2017 but which was curtailed on 29

January 2016 so as to expire on 29 March 2016. The appellant then overstayed. On 4 March 2018 he was arrested in connection with criminal matters and he claimed asylum.

3. At his screening interview the appellant gave his religion as Mormon and said he had come to the United Kingdom to preach the gospel of Jesus Christ. He said that, in Albania, he had been the subject of violence because he is homosexual and also because he told his father he had been baptised. He described himself as a missionary for his church.

4. At the substantive interview he said his life was threatened because he converted to Christianity from Islam and also because he is bisexual, not homosexual. He said he feared his father and Albanian society in general.

5. While in the detention centre, the appellant obtained a rule 35 report showing that he has scars on the left side of his chest. The GP who examined him stated the appellant was suffering with depression, flashbacks and nightmares because he had been bullied by other Albanians in detention and he felt his symptoms were even worse. Additionally, he has scars which may be due to the history given of being beaten and cut with knives.

6. The respondent refused the claim. In brief summary, the respondent did not believe the appellant was either a Mormon or bisexual. In any event, the country guidance in IM (Risk – Objective Evidence – Homosexuals) Albania CG [2003] UKIAT 00067 showed there was not a reasonable likelihood gay people are persecuted in Albania.

7. Prior to the hearing of the appeal, on 1 April 2019, the appellant's solicitors wrote to the tribunal to state that they did not have instructions to represent him. However, in the interests of justice and to avoid prejudice to the appellant, they requested the hearing be adjourned. The following day they wrote again and asked to be removed from the record. The appellant did not attend the hearing of the appeal. Judge Hussain decided not to adjourn and he proceeded to hear the appeal.

8. In his decision, under the heading My Findings, Judge Hussain stated that he had had regard to the background evidence relating to Albania and found there nothing inconsistent with the appellant's claims. He noted the respondent accepted the appellant was a national of Albania. However, he also noted the respondent had given a number of reasons for rejecting the credibility of the appellant's claim to be bisexual and to have converted to Christianity, as well as his experiences of ill-treatment in Albania. At paragraph 33 of his decision, Judge Hussain stated that he considered the respondent had given cogent reasons

why the appellant's claim lacked credibility. In effect, he agreed with those reasons. Then at paragraph 34 he stated as follows,

> "34. It seems to me that the appellant has thrown in everything he could possibly find to support his claim, including testimony to a medical practitioner who prepared a report in his support. In paragraph 6 of the report of Dr Krishna Balasubramaniam, it is recorded that the appellant claimed that his father was a gangster and a loan shark. That has echoes of what the appellant told the respondent. However, the appellant also told the doctor that his father wanted his sons to follow the Muslim religion in a strict manner. It seems to me that the appellant cannot, on the one hand, portray his father as a merciless murderer and, at the same time, a strict Muslim. The two things do not go together. In my view, this is a further illustration of the appellant throwing in everything that he is able to, to bolster an otherwise weak claim."

9. Finally, in paragraph 35, Judge Hussain stated that, if he was wrong in making an adverse credibility finding, the appellant should be able to obtain protection from the authorities in Albania and/or relocate internally.

10. The grounds seeking permission to appeal contain five points. In summary, the first point is that Judge Hussain failed to take account of evidence which had been filed. In particular, whilst noting his agreement with the respondent regarding the impact of the lack of evidence supporting the claim made by the appellant that he had had gay partners in the United Kingdom, he had overlooked the fact there was a letter from one of them, a Mr Kanley McHayle, in the bundle. Secondly, the judge had ignored the expert report Doctor Antonia Young. Thirdly, Judge Hussain had made perverse or irrational findings. This ground appears to be a restatement of the first and second grounds. Fourthly, the judge erred by failing to provide adequate reasoning and had made an error of fact. This is a challenge to paragraph 34 of the judge's decision and argues that there are clear examples in the world of violent jihadis claiming to be strict Muslims. Fifthly, there had been procedural unfairness because the judge should have adjourned. This ground explains that the appellant had moved address which is why his solicitors had been unable to take instructions from him.

11. Permission to appeal was granted, in my judgement, solely on the first two grounds. Mr Eaton took issue with this but it is clear from the order of Judge of the First-tier Tribunal Ford that she intended that the only grounds which she considered to contain arguable errors of law were those she referred to as 2a and 2b. In relation to 2c and 2d (equivalent to the fourth and fifth grounds), the order contains reasons why the grounds are not arguable.

12. The respondent has filed a rule 24 response opposing the appeal.

13. I heard submissions as to whether or not the decision of Judge Hussain must be set aside because it contains material errors of law. Having done so, I have concluded the decision must be set aside and re-made. My reasons are as follows.

14. Mr Eaton's best point, in my judgement, was his challenge to the judge's reliance on the challenge made in paragraph 36 of the refusal letter that the appellant's failure to adduce evidence from his partners damaged his credibility. At paragraph 20, Judge Hussain wrote,

> "The appellant was questioned about his relationships in this country when he claimed that he was getting to know Kanley and Waleed and that he was still connected with his former partner, Shy, whom he described as a very important person in his life. However, it was noted that the appellant had not submitted any evidence from these individuals and, therefore, in line with the decision in TK (Burundi), his failure to adduce evidence which was readily available damaged his credibility."

15. The judge does not expressly adopt the respondent's reasoning at that point. However, it is clear from the decision read as a whole that he agreed with and adopted the respondent's reasons for refusal as his own at paragraph 33. That is not an error. However, the problem is that the judge had, by agreeing with the reasons for refusal, adopted the approach set out in TK (Burundi).

16. I take this to be a reference to the well-known observation of Thomas LJ at paragraph 16 of TK (Burundi) v SSHD [2009] EWCA Civ 40, as follows:

> "Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons."

17. The grounds point out, and Mr Eaton reiterated, that the appellant's bundle did contain a letter from Kanley McHayle, which Judge Hussain has not had regard to in his decision. I have carefully considered the letter.

18. The document in question appears at pages A81 and A82 of the appellant's bundle. In it Mr McHayle describes the appellant as his "friend" but states their friendship grew stronger and "we started becoming intimate". He says he is willing to support the appellant in any way he can but he does not believe in the necessity for gay people to have to prove they are gay.

19. Ms Isherwood pointed out that the letter is not signed and I note that it does not have a copy of the author's passport or any other identity document attached to it. The author did not attend the hearing to give evidence. However, the bundle does contain transcriptions of some WhatsApp communications between the appellant and Mr McHayle.

20. In the circumstances, I find that Judge Hussain made a material error of law. He has drawn an adverse inference from the absence of evidence which could reasonably be expected to be made available in circumstances in which such evidence had in fact been adduced. The error would be immaterial if the evidence was not capable of leading the judge to make a different decision. However, the evidence is, in my judgment, capable of bearing some weight and, in the circumstances, must be deemed to have been capable of leading the judge to consider the case differently.

21. I note as well that the appeal was adjourned on 22 August 2018, on which occasion the appellant attended, because Mr McHayle had been unable to attend to give evidence following a cycling accident.

22. Although it is not strictly necessary to decide the point, I do not agree with Mr Eaton that the failure to refer to Dr Young's report led Judge Hussain to make a material error of law. A report by Dr Young was the subject of serious criticism in MF (Albania) v SSHD [2014] EWCA Civ 902 because she had allowed herself to take on the role of advocate. Although she states at the end of her report in this case that she has taken this on board and sought to address the suggested lack of objectivity, it seems to me that the report prepared in the instant case is vulnerable to a degree of criticism for similar reasons.

23. Mr Eaton argued the judge erred by failing to apply the most recent country guidance given in BF (Tirana – gay men) Albania [2019] UKUT 0093 (IAC), which was promulgated on 26 March 2019, six days before the hearing in the First-tier Tribunal and around four weeks before the decision was promulgated. It is clear neither side referred Judge Hussain to the decision. Mr Eaton accepted the case could cause the appellant "some difficulties" in establishing his claim but he highlighted the first headnote, which states,

> "Particular care must be exercised when assessing the risk of violence and the lack of sufficiency of protection for openly gay men whose home area is outside Tirana, given the evidence of openly gay men from outside Tirana encountering violence as a result of their sexuality. Such cases will turn on the particular evidence presented."

24. I have noted above that Judge Hussain decided that, even if he were wrong to make an adverse credibility finding against the appellant with respect to his sexuality, he would be able to obtain protection and relocate. That alternative finding is very briefly expressed and does not

take account of the up to date guidance provided in BF (Albania). I find therefore that the failure to have regard to country guidance was capable of affecting the outcome of the appeal.

25. The appeal is allowed to the limited extent that the decision of the First-tier Tribunal is set aside. The representatives were in agreement that, in the event I were to conclude the decision should be re-made, given the appellant had not attended the hearing, the appropriate order was to remit the case to the First-tier Tribunal for a re-hearing before another judge with no findings preserved. The appellant and his witnesses will have to give oral evidence.

26. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal will be heard de novo by another judge in the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 July 2019

Deputy Upper Tribunal Judge Froom