Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11818/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 December 2020	**On 13 January 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

MRB (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Griffiths, instructed by Milestone Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant as an asylum applicant whose case involves sensitive personal information is granted anonymity throughout these proceedings. No report of these proceedings (in whatever form) shall directly or indirectly identify the appellant. Failure to comply with this order could lead to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Pakistan whose appeal against the decision of the Secretary of State for the Home Department (the Secretary of State) refusing his asylum, humanitarian protection and human rights claims was dismissed in a decision by First-tier Tribunal Judge Verghis (the FtTJ) promulgated on 28 January 2020. Permission to appeal on all grounds was granted by Judge Macdonald on 28 February 2020.

2. The basis of the appellant's claims is that he is a gay man and fears persecution on grounds of his sexual orientation if he returns to Pakistan.

3. The FtTJ found that the appellant was not gay and therefore dismissed his appeal on all grounds.

4. In Grounds of Appeal dated 10 February 2020 and further in a Skeleton Argument dated 18 May 2020, Ms Griffiths on behalf of the appellant raises a number of grounds of appeal, on which she elaborated orally at the hearing. Those grounds overlap to an extent, but may be summarised as follows:-

   (i) Ground 1 – error of law in finding the Appellant's claim not to be credible on the basis that it lacked corroboration;

   (ii) Ground 2 – mis-stating the evidence as to the reaction of A's housemates to his relationship with another man, fails to consider the evidence given and makes findings based on stereotypical assumptions;

   (iii) Ground 3 – failure to give any or adequate reasons for material findings, including: rejecting the A's claim that he did not know that he could claim asylum in the UK based on his sexuality; rejecting the evidence of A's witnesses; finding that A should have been able to produce other evidence of life as an openly gay man in the UK since 2014 and his failure to do so damaged his credibility; finding that A had given 'weak and vague' evidence about his sexual orientation;

   (iv) Ground 4 - failure to put material matters to witnesses before making adverse findings;

   (v) Ground 5 - failure to consider all evidence in the round (*Mibanga* [2005] EWCA Civ 367).

5. Mr Whitwell for the Respondent resisted the appeal, maintaining in summary that: when the decision is read as a whole it is apparent that it is adequately reasoned; this is not a case where the FtTJ merely relied on the lack of corroborative evidence as the FtTJ also took account in particular the appellant's delay in claiming asylum (and s 8 of the 2004 Act); and that the decision is well-structured so that all the evidence is considered before a conclusion is reached.

6. We take each Ground in turn:-

7. As to Ground 1, Ms Griffiths for the appellant argued in the Grounds and Skeleton Argument that it would be an error of law for a tribunal to require corroboration for an appellant's account, but she did not press this point at the hearing, and we understood her to accept that the relevant principles are to be found, so far as the European jurisprudence is concerned, in *A v Staatssecretaris van Veiligheid en Justitie (United Nations High Commissioner for Refugees (UNHCR intervening)* [2014] EUECJ C-148/13 (*"ABC"*) and, so far as the domestic jurisprudence is concerned, in *SB (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 160.

8. Those cases make clear that a lack of corroboration for an appellant's account may be a relevant factor to take into account when assessing an asylum claim, including a claim based on sexual orientation. In *ABC* the CJEU held (at paragraph 58) that, in accordance with Article 4(5) of Directive 2004/83, a lack of corroborative evidence can be taken into account where (among other things) the applicant has not made a genuine effort to substantiate his application, or has not provided a satisfactory explanation for any relevant elements that are missing, or where the applicant has (without good reason) failed to apply for international protection at the earliest possible time. In *SB* the Court of Appeal held (at paragraph 46) that a lack of corroborative evidence could be taken into account where the applicant fails to produce supporting evidence on relevant issues where *"logically"* the applicant should be able to do so, although a material error in logic would be an error of law (paragraph 48).

9. As such, we do not consider that the judge erred in law in taking into account that aspects of the appellant's case lacked corroborative documentary evidence and Ground 1 fails.

10. As to Ground 2, we accept the appellant's submission that the FtTJ in paragraph 45 of the decision overstates the evidence in relation to the reaction of the appellant's housemates to his commencing a homosexual relationship with Khalid. In that paragraph, the FtTJ gave the following reasons for finding the appellant's account in this respect not credible: *"Given the other occupants were all from Pakistan and subject to the same societal and religious expectations, the tribunal found it less than reasonably likely that all the occupants would have accepted the news that the appellant and Khalid were in a same sex relationship without question or reservation"*. The FtTJ here wrongly recorded the appellant's evidence. It does not follow that because the appellant said in his witness statement that *"Everyone was really happy for us"* that his housemates had accepted the news *"without question or reservation"*. They may have had questions or reservations that they did not communicate to the appellant. However, this is not in our judgment a material error because we cannot see that it would have made any difference to the FtTJ's reasoning at this point if she had directly quoted the appellant's witness statement.

11. Nonetheless, we do find that there is an error of law in the judgment at this point, as a result of the FtTJ's reliance on the stereotype as to the attitude of Pakistani nationals to homosexuality. It is legitimate (as the CJEU indicated at paragraph 62 of *ABC*) to take into account as part of the factual matrix in an asylum claim certain *"stereotyped notions"*, and general attitudes towards homosexuality in a particular country are the sort of stereotypes that may be relevant (at least where there is good evidence on which such a stereotype may be based, such as there is for Pakistan in the Country Policy and Information Notes). However, care must always be taken where reliance is placed on stereotypes. In particular, it must be remembered that a stereotype is a generalisation and it is always necessary to consider whether that stereotype is applicable in the particular case.

12. In this case, it does not appear that the FtTJ when applying this stereotype considered the evidence before her as to why the stereotype might not apply in the particular case. That evidence included the appellant's explanation for his housemates' reaction (as given in his asylum interview), which was that his housemates' experience of living in the UK had changed their attitudes towards homosexuality. His evidence in that regard was supported by the evidence from the appellant's elderly friend, Mr Malik (who had grown up in Pakistan), that his own attitudes to homosexuality had changed as a result of living in the UK.

13. As such, the FtTJ in paragraph 45 left a relevant factor out of account in deciding that the appellant's account of his housemates' reaction to his relationship with Khalid was not credible. Alternatively, the FtTJ failed to give adequate reasons for that finding. This was an error of law and Ground 2 succeeds.

14. As to Ground 3, it is well established that an appellate court *"needs to be able to satisfy itself that the fact finder has at least identified the most relevant pieces of evidence and given sufficient reasons (which might be quite concise) for accepting or rejecting it"*: see *SB (Sri Lanka)* (ibid) at paragraph 44. In this case, the appellant criticised a number of parts of the FtTJ's reasons and those we have found to be made out are as follows:-

    (i) The appellant entered the UK in 2011 on a Tier 4 student visa but overstayed from November 2012. He did not claim asylum until April 2019. In his witness statement he gave evidence that this was because he was not aware prior to 2019 that he could claim asylum on the basis of his sexuality, and that he learned of this as a possibility from a friend (Qaisar Ali) at a gay club. The FtTJ rejected the appellant's evidence in this regard at paragraph 49 because it was *"trifling"* and *"on his own evidence, he was living openly as a gay man and for some months in 2014 he claims he was openly in a relationship with another gay man"*. However, a claim to ignorance of rights is not *"trifling"*, it is fundamental to whether someone might be expected to make a claim, and it is irrelevant to the credibility of claim to be ignorant of legal rights that the appellant was living

openly as a gay man and had a gay relationship. It is not logical to suggest (without more) that being openly gay gives you knowledge of asylum processes and the grounds for claiming asylum.

(ii) The FtTJ rejected the evidence of the two witnesses who attended tribunal on behalf of the appellant (Mr Malik and Md Saifullah), in both cases concluding that they *"had given evidence to assist the appellant and there was in fact no substance to the evidence given"*. Although the FtTJ does not say so, it is in context apparent that the FtTJ was here finding that Mr Malik and Md Saifullah had both come to tribunal to lie in order to bolster the appellant's claim. However, there is nothing to suggest that it was put to either witness that they were lying. Further, the FtTJ's reasons for finding their evidence not to be credible were inadequate as in relation to both the FtTJ simply said their evidence was *"brief and vague"*. That might be a sufficient reason if it was patently the case that a witness' evidence was *"brief and vague"*, but that is not the position with the evidence of either of these witnesses. Their witness statements may be relatively brief, but they are not vague. Mr Malik's account in his witness statement of his relationship with the appellant contains dates and details of his coming out as a gay man. Likewise, the statement of Md Saifullah contains dates and details of his seeing the appellant at gay clubs (which he identifies by name) and in oral evidence he also said that he had seen the appellant kissing men in gay bars. Given that the issue before the judge was simply whether the appellant was gay, the evidence given by these witnesses could not reasonably be described as *"vague"* information: it was evidence that in each case went directly to the question of the appellant's sexuality. Describing it as *"vague"* was an inadequate reason for rejecting their evidence.

(iii) For similar reasons, the FtTJ's finding at paragraph 51 that the appellant's evidence *"provided little insight into his claimed sexual orientation"* because it was *"bland and lacking in detail"* is not adequate given the length of the appellant's witness evidence and the detailed information it contains about: his feelings for his cousin; how those feelings developed as he grew up; his reaction to seeing him at a family gathering after a break of three years; how he continued to think about him after that; how his cousin getting married was the worst night of his life; or his evidence about his relationship with Khalid. Moreover, the FtTJ's reasoning at this point with regard to the appellant's feelings for his cousin is internally inconsistent because in paragraph 43 she had accepted that the appellant's evidence about his feelings for his cousin and his sexual awakening on its own *"seems plausible"*.

(iv) Further, we also accept the appellant's submission that the FtTJ erred at paragraph 45 in finding that the appellant ought to have been able to produce corroborating evidence himself or from his other housemates about his relationship with Khalid. The reasoning in relation to the appellant itself is insufficient because it fails to deal

with the appellant's evidence that he did not keep photographs or other evidence because he did not know he would need to. The reasoning in relation to the housemates is insufficient because it is founded on speculation by the FtTJ that *"it is conceivable that he might have kept in contact with some of them"*. That is of course not a finding that he *had* kept in touch with his housemates and it is certainly not a sufficient basis on which to find that the appellant ought to have been able to obtain corroborating evidence from his housemates.

15. We therefore find that Ground 3 succeeds.

16. As to Ground 4, as noted above, we accept that the FtTJ found Mr Malik and Md Saifallah to be lying without putting that point to them. That was procedurally unfair, and an error of law, although on its own we would not have found this to be material as the likelihood is they would simply have denied that allegation and it would still in principle have been open to the FtTJ to reject that evidence – if she gave sufficient reasons for doing so.

17. As to Ground 5, the appellant relies on *Mibanga v SSHD* [2005] EWCA Civ 367, and in particular the principle that it is *"axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto"*. There is some force in the appellant's submission in this respect since our overall impression is that this is a case where the FtTJ proceeded by finding (what in our judgment were in many cases insufficient) reasons to reject the various planks of the appellant's case without standing back and fairly assessing the whole picture. However, the FtTJ has at a number of points on the face of the decision indicated that she has considered each piece of evidence with reference to the whole (see, for example, paragraphs 43 and 44) and has structured her decision so that her conclusion is not expressed until paragraph 55 after consideration of all the evidence. In the circumstances, we do not consider that the FtTJ fell into the *Mibanga* error.

18. For all these reasons, we we are satisfied that the decision of the first-tier tribunal involved the making of an error of law and we set it aside.

19. We announced our decision at the hearing and the parties indicated that they were in agreement that if there was an error of law the case should be remitted to the first-tier tribunal. In the light of paragraph 7.2 of the 2012 Practice Direction, and the nature and extent of the judicial fact finding which is necessary in order for the decision in the appeal to be re-made, we agree that it is appropriate for the matter to be remitted.

Notice of Decision

1. The decision of the First-Tier Tribunal involved the making of an error of law, and we set it aside .

2. We remit the appeal to the First-Tier Tribunal.

Signed Date 17 December 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

Holly Stout
Deputy Upper Tribunal Judge Stout