Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13769/2018 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Wednesday 24 March 2021

Decision & Reasons Promulgated
On 15 April 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

KSY
[ANONYMITY DIRECTION MADE]

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Briddock, Counsel instructed by Milestone solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves a protection claim, I consider it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge K Swinnerton promulgated on 8 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal challenging the Respondent's decision dated 27 November 2018 refusing his protection and human rights claims.

2. The Appellant is a national of Malaysia. He claims that he arrived in the UK in February 2011. He claimed asylum on 13 June 2018. His asylum claim is based on his sexuality. The Respondent did not accept the credibility of that claim. The Judge similarly did not accept the claim as credible. The majority of the credibility findings focus on the Appellant's life in the UK and relationships he claims to have had in the past and to have presently.

3. The Appellant's appeal was first dismissed by First-tier Tribunal Judge Hamilton in a decision promulgated on 4 February 2019. However, Judge Hamilton's decision was set aside by Deputy Upper Tribunal Judge Lewis in a decision promulgated on 30 July 2019 and the appeal remitted for redetermination by the First-tier Tribunal. It is in that way that the appeal came before Judge Swinnerton whose decision is under challenge before me.

4. The Appellant challenges the Decision on three grounds summarised as follows:

> Ground one: The Appellant did not have a fair hearing as the Judge descended into the
> arena.
> Ground two: The Judge failed to take into account certain evidence.
> Ground three: The Judge failed to give adequate reasons for some of his findings and/or
> failed to consider the evidence in the round.

5. Permission to appeal was refused by First-tier Tribunal Judge Saffer on 31 January 2020 in the following terms:

> "Ground 1 is without merit as the Judge was entitled to seek clarification of matters that had not been properly explained or explored by representatives who have a duty to assist the Tribunal but appear not to have done so. The notes do not indicate that the Judge 'entered the arena'.
> Ground 2 is without merit as the Judge does not have to slavishly recite or make findings on every piece of evidence.
> Ground 3 is without merit as the Judge does not have to give reasons for reasons. The findings were evidence-based and more than adequate."

6. On renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge O'Callaghan said to be on grounds two and three only. I will come on to consider what was the effect of that grant. UTJ

O'Callaghan extended time as the application was four days out of time. He went on to explain the reasons for his decision to grant permission as follows:

> "... 4. The grounds of appeal, drafted by counsel, are detailed. Ground 1 complains that a neutral observer would conclude that the appellant did not have a fair hearing as the Judge entered the arena. Care has been taken by counsel to detail the substance of a number of questions asked by the Judge to the appellant, said to have been undertaken in the spirit of cross-examination. Further, the conduct of the Judge is said to have been 'combative'. The notice of appeal is not accompanied by a witness statement from counsel, the appellant or a solicitor attending the hearing before the Judge. This is a mandatory requirement where it is contended that a litigant was deprived of his right to a fair hearing by reasons of events which occurred at the hearing itself: *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC). Such failure means that this ground must be considered to be unarguable.
> 5. Grounds 2 and 3 of the grounds of appeal are arguable. The Tribunal will expect the appellant to address the materiality of the asserted errors.
> 6. The grounds advance arguable errors on a point of law and so I find that it is in the interests of justice for time to be extended so as to permit the appellant to bring his appeal."

7. Subsequently, by way of a Note and Directions, UTJ Gill reached the provisional view that it would be appropriate to determine the error of law issue on the papers. The parties' view on that proposal were invited. By written submissions dated 14 May 2020, the Appellant objected to the determination of the error of law issue on the papers unless the Tribunal was minded to find that the Decision contained an error. By those submissions, the Appellant also purported to renew the application for permission to appeal on ground one.

8. By directions dated 2 July 2020, UTJ Finch ordered that the error of law issue be determined at a remote hearing. She also directed that the Tribunal should send to the parties Judge Swinnerton's record of proceedings. I was informed that this was not done. She also directed that the Respondent file her record of proceedings if one exists and that the Appellant's counsel should submit a witness statement "outlining the manner in which he believes that the way in which the First-tier Tribunal Judge Swinnerton conducted the appeal hearing was unfair". So far as I can see, there was no compliance with those directions by either party. I will come on to the impact of that failure below.

9. So it was that the hearing came before me as a remote hearing. The hearing was attended by representatives of the parties, by the Appellant and by several of his friends. There were some minor technical difficulties but those were not such as to affect the course of the hearing. I had before me a core bundle of documents relevant to the appeal, the Appellant's bundle of documents before the First-tier Tribunal, a supplementary bundle of documents and other loose documents which appear to have been filed piecemeal. I also have the Judge's handwritten notes of the hearing which I have been able to decipher so far as it is necessary for me to do so.

10. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

Terms of Grant of Permission

11. I begin with the basis on which permission was granted. As I indicate at [6] above, UTJ O'Callaghan expressed the decision as a grant on grounds two and three only. Mr Clarke submitted that the Appellant could not therefore argue ground one.

12. There is no provision within the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") for a party to orally renew an application for permission to appeal once that is refused by this Tribunal. The only course open to a party in those circumstances is to bring a so-called "Cart" challenge to the Tribunal's refusal of permission.

13. However, as I pointed out at the hearing, there is no express refusal of permission to appeal on ground one, even though the grant of permission is expressed as a limited one. The reason for my conclusion is to be found in paragraph 22 of the Procedure Rules ("Rule 22") which reads as follows:

> **"Decision in relation to permission to appeal**
> 22.— (1) Except where rule 22A (special procedure for providing notice of a refusal of permission to appeal in an asylum case) applies, if the Upper Tribunal refuses permission to appeal or refuses to admit a late application for permission, it must send written notice of the refusal and of the reasons for the refusal to the appellant.
> (2) If the Upper Tribunal gives permission to appeal—
> (a) the Upper Tribunal must send written notice of the permission, and of the reasons for any limitations or conditions on such permission, to each party;
> (b) subject to any direction by the Upper Tribunal, the application for permission to appeal stands as the notice of appeal and the Upper Tribunal must send to each respondent a copy of the application for permission to appeal and any documents provided with it by the appellant; and
> (c) the Upper Tribunal may, with the consent of the appellant and each respondent, determine the appeal without obtaining any further response."

14. There are two reasons why the wording of Rule 22 leads me to the conclusion that the Appellant should be permitted to pursue his first ground. First, UTJ O'Callaghan did not, in the operative part of the decision granting permission actually refuse permission to appeal on the first ground. Second, unless a direction is made by the Tribunal, the application for permission to appeal stands as the notice of appeal. That application therefore includes ground one and there is no direction removing that ground as part of the appeal.

Ground one

15. I therefore turn to consider ground one. Before I come to the substance of that ground it is necessary to say something about the procedure adopted to consider it. As UTJ O'Callaghan observed, ordinarily, if an appellant wishes to argue that he has not had a fair hearing relying on evidence put forward by his advocate, that advocate cannot continue to act as such in the appeal. The advocate then becomes a witness. It is trite law that an advocate cannot give evidence.

16. UTJ O'Callaghan relied in this regard on the case of BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). The headnote guidance given in that case is as follows:

> "(i) It is timely to recall the golden rule of judicial adjudication that justice must not only be done but must manifestly be seen to be done.
> (ii) In certain cases, likely to be rare, evidence presented to the Upper Tribunal may include a witness statement compiled by a representative involved in the hearing before the First-tier Tribunal ("FtT"). In practice, this is most likely to occur in cases where such evidence is considered necessary to demonstrate that the appellant was deprived of his right to a fair hearing at first instance.
> (iii) Evidence of this kind will not be required if the determination of the FtT speaks for itself on the relevant issue.
> (iv) In applications for permission to appeal, the distinction between legal submissions and arguments (on the one hand) and evidence about events at the hearing (on the other) must be carefully observed.
> (v) Where an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness.
> (vi) The respondent's rule 24 response must engage specifically with additional evidence of this kind."

17. In this case, Mr Briddock, who also represented the Appellant before Judge Swinnerton, included in the pleaded grounds extracts from his notes of the exchanges between the Judge and the witnesses to illustrate the points he sought to make about the inappropriateness of the questions asked. If it had been necessary for him to rely on those notes, I would have had no hesitation in preventing him from doing so unless he provided a witness statement and withdrew from the case as advocate. In particular, I reject the suggestions made in written submissions dated 1 June 2020 that he should be permitted to remain as advocate if his notes of the hearing were not disputed and therefore stood unchallenged. Reliance on those notes amounts to the giving of evidence whether that evidence is challenged or not. Such reliance is therefore contrary to the principle that an advocate cannot give evidence.

18. However, in this case, I formed the view that it was not necessary to rely on those notes for two reasons. First, I have the Judge's record of proceedings on which I can rely. I appreciate that this is not an ideal solution as neither representative had seen those and could not therefore check their accuracy. However, second, and more importantly, the

Decision itself reflects the point which Mr Briddock sought to make regarding the questions asked by the Judge. Thus, in the section of the Decision dealing with the hearing, at [11] to [18], the Judge records that he has asked questions of the Appellant and his witnesses. That record appears at [13], [14], [15] and [16] of the Decision. There are other references to questions having been asked of the witnesses elsewhere in the Decision.

19. In short summary, therefore, I permitted Mr Briddock to argue ground one. Insofar as he referred to his own notes when making his points, I do not take those into account as evidence. He is not entitled to give evidence as an advocate. I am however satisfied that those notes broadly follow the record of the proceedings which I have on file. Accordingly, I accept that the Judge asked a number of questions, in particular regarding addresses at which the Appellant and his witnesses lived, their living arrangements and the circumstances in which the Appellant left his aunt's address in 2011. The record of proceedings on file supports the summary of the Judge's questions as set out in the Decision (see [18] above).

20. I turn then to the parties' submissions on this ground, Mr Briddock confirmed that his complaint was not about the tone of the Judge's interventions but that the nature of the questions asked coupled with the number of questions showed that the Judge had descended into the arena. The questions asked were not matters of clarification but amounted to the testing of the evidence and therefore cross-examination. He submitted that the questions asked were not ones which required clarification. They largely concerned the place(s) at which the Appellant and his partner and friends were living at various times. The Judge already had evidence from the Appellant about where he was living and did not need to ask the Appellant's witnesses about this. The questions could only have been with a view to establishing some inconsistency between their testimony. Mr Briddock submitted that this line of questioning amounting to cross-examination would lead an observer to conclude that the Appellant had not had a fair hearing.

21. As Mr Clarke reminded me, the test for whether an appellant has had a fair hearing in these circumstances is not what any observer would make of the hearing but what a fair-minded and informed observer would conclude (Magill v Porter [2001] UKHL 67 at [103]).

22. Mr Clarke also drew to my attention the decision of this Tribunal in PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 337 (IAC) ("PA") and to the following part of the headnote:

> "(4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge.
> (5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision."

There is nothing to suggest that Mr Briddock intervened to prevent what he says he saw as inappropriate questioning in the course of the hearing.

23. I do not place weight on Mr Clarke's submissions regarding the preparation of the evidence on the part of the Appellant's solicitors. As Mr Briddock pointed out, the nature of the Respondent's challenge to the Appellant's credibility in the decision letter was focussed on his discovery of his sexuality in Malaysia and what is said to have happened there rather than events in the UK. That may well be because the evidence before the Judge was different from that before the Respondent. As I will come to, though, the content of the evidence which was before the Judge is relevant to the nature and extent of the questions asked.

24. There was some discussion at the hearing about the nature of proceedings before the Tribunal and whether those are inquisitorial or adversarial. Although that is a consideration when one is considering the appropriateness of questioning by the Judge, ultimately I do not consider that it advances matters. Ultimately, the essential issue is whether there is an appearance of bias on the basis that the Judge has descended into an arena and whether the fairness of the proceedings is compromised by the conduct of the hearing.

25. I have however found it helpful to refer myself to what was said by a Presidential panel of this Tribunal in the case of K v Secretary of State for the Home Department [2004] UKIAT 000061 in the context of a not dissimilar challenge. The relevant passage of the decision is at [41] to [45] as follows:

> "41. Although Mr Morgan puts his case on the basis that the issue is whether or not the hearing had been fair, we have also considered it appropriate to ask ourselves whether there was any apparent bias in this case. The test for that is whether the circumstances when ascertained would lead to a fair-minded and informed observer concluding that there was a real possibility or real danger that the Adjudicator was biased; Porter v Magill [2002] 2 WLR 37.
> 42. There is a danger that the comments relied on in Oyono have been misunderstood. An Adjudicator or any judge is of course entitled during evidence-in-chief to seek clarification of an answer, whether because it has not been heard properly or understood or interpreted properly. He is entitled to check that he has recorded the answer correctly. But that is not the limit on his powers or indeed his obligations of intervention during the giving of evidence. An Adjudicator also has obligations in relation to the general control of a case. It is proper for an Adjudicator to intervene during examination-in-chief and cross-examination for the purposes of moving the proceedings along, so long as that is done in a fair manner. It is necessary and proper for an Adjudicator to point out that a line of questioning is irrelevant or valueless or repetitious or is going nowhere. It will, of course, be necessary to consider any response made by a representative to such an approach. But what was said by the Deputy President in Oyono assumes that the questions being put are relevant and are not being pursued at undue length. Even where the parties are both represented, it is still relevant for questions to be put by the Adjudicator to a witness if they raise matters which trouble the Adjudicator if they have not been raised or dealt with by the opposing advocate. This is especially so if the Adjudicator is concerned by the point

and it is something which may affect the decision or indeed should affect the decision, but cannot fairly do so without the relevant witness being given the opportunity to deal with it. The comments made in this respect by the Adjudicator in paragraph 60 are entirely right.

43. Of course, what is said in Oyono in relation to the timing at which an Adjudicator should put questions for that purpose is right. An Adjudicator ought not to interrupt examination-in-chief or cross-examination except in the circumstances to which we have referred or for other reasons associated with the general control of the case and the court room. If there are inconsistencies between documents and oral evidence or between answers which have been given already, it is nearly always best to wait until after cross-examination and re-examination to see what matters are put. However, it is wholly legitimate for the Adjudicator to ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case.

44. The manner in which any intervention is undertaken is also important. It should not be done in any hostile manner or in a manner which suggests that the Adjudicator's mind has been made up. Questions should not be leading questions or ones which conceal the purpose for which they are asked, but instead should be direct and open-ended questions. It is perfectly proper for the Adjudicator to ask, after questions have been put in cross-examination and re-examination has taken place, why a witness has said x when earlier that or another witness has said y, or how document x can be reconciled with document or oral evidence y. An Adjudicator is entitled to follow the logical train of answers to see how they fit with the case if that is regarded as potentially significant for an issue in the case. It is also important, however, that an Adjudicator should keep a sense of proportion about the questions which he or she asks. It is not for the Adjudicator to take over conduct of the case either by the number of questions asked or the development of his or her own theories. The interventions may or may not assist one or other party. They are not unfair merely because one or other party may derive assistance from them.

45. As to submissions, it is quite wrong to suppose that there is an obligation on an Adjudicator merely to keep silent during submissions, noting them down regardless of whether they are words of wisdom or irrelevancies, failing to deal with the points which trouble the Adjudicator. An Adjudicator is entitled also to intervene to ensure that an advocate responds, if he is not otherwise doing so, to points which his opponent has made. There is no reason for the number of questions to be asked of one side to equal the number of questions asked of another. The degree of intervention will depend entirely upon the focus and relevance of the submissions made; their helpfulness and their succinctness. It is perfectly proper for an Adjudicator to move submissions on by indicating that she has understood the point or to prevent the irrelevant in order to try and obtain the relevant answers for the purposes of writing the determination. Much will depend upon the nature of the case and the style of the advocates and Adjudicator. It is important, however, that the Adjudicator does not intervene to such an extent that relevant submissions are disrupted and relevant points are prevented from being made. In that way, the Adjudicator would fail to understand the case and potentially would miss important points being made to her."

26. Whilst that passage undermines the submission made by Mr Briddock that a Tribunal Judge should only intervene where a party is unrepresented or not present, it does make clear that each case turns on its own facts and, as I have already noted, the essential questions are whether there is apparent bias and/or unfairness created by the questioning.

27. Before considering those questions in the context of this appeal, it is however necessary to make one further remark. As I pointed out to Mr Briddock, there is a difficult balance to be struck for a Tribunal Judge when considering whether to intervene. If a Judge has noted an inconsistency or lack of evidence which potentially undermines a witness' evidence or a party's case and fails to raise it, that would quite rightly be criticised on the basis of lack of fairness for failure to give the aggrieved party or witness the opportunity to deal with the point. Can it really be suggested that the Judge is, in such circumstances, obliged to simply ignore the point or inconsistency if the opposing party fails to challenge it?

28. Having considered the record of proceedings, the evidence and the parties' submissions, I am satisfied that the Judge's interventions would not lead a fair-minded and informed observer to conclude that the hearing was not a fair one. The Judge gave the Appellant and his witnesses every opportunity to address issues which were concerning the Judge. The Appellant's credibility and that of his witnesses were at the heart of this appeal. The Judge did not act unfairly in asking the questions he did. I have reached that conclusion for the following reasons.

29. First, I have regard to what is said in PA. The Appellant was legally represented by Mr Briddock at the hearing before Judge Swinnerton. Mr Briddock could have objected to the line of questioning at the time. There is no evidence that he did so.

30. Second, although I accept that the Respondent did not dispute the Appellant's credibility based on his relationships in the UK in the decision letter, that is largely because the nature of the evidence has changed over time. The Judge was obliged to consider and determine the appeal based on the evidence before him. That evidence gave rise to wider issues which the Judge clearly viewed as important.

31. Turning to the facts, in broad terms, the Appellant said that he was in a same-sex relationship with [K] in Bournemouth after he left his aunt's house in 2011 for a period of a couple of years. [K] did not provide any evidence because the Appellant says that he is no longer in contact with him. The Appellant's evidence about that relationship and what his friends did or did not know or say about that relationship was therefore important.

32. The Appellant says that he is now in a same-sex relationship with [N]. [N] was called to give evidence as were friends with whom they said they both lived. The existence of that relationship which included evidence about where they lived together and when was also therefore important. The credibility of not simply the Appellant but also of his witnesses was therefore a crucial matter for the Judge to determine.

33. Whilst I accept that the Appellant's witness statement contains some detail about his relationships and where he lived (in general terms), with whom and when, the same cannot be said of the statements of the other witnesses. For example, the statement of [N] is that the Appellant moved in with [N] in September 2019. It is not said where they lived together. The statement of [J], said to be [N]'s ex-partner, says that he and his current partner visited [N] in Cardiff in "late September 2018" when [N] was living in Cardiff. He says this in an amended statement having failed in his first statement to mention that [N] lived in Cardiff at the time. Yet, [N] does not mention in his statement ever living in Cardiff and [J] does not mention visiting [N] and the Appellant in London. It is notable that the Appellant says that he met [N] in London in 2018. The Appellant and other of the Appellant's witnesses mention attending [N]'s birthday party at a club in London in August 2018. Of course, that does not mean that [N] might not have been living in Cardiff at the time. However, it is unclear who was living where and when because of the vague nature of some of the witness statements and failure to mention locations even in general terms when dealing with the development of the relationship between the Appellant and [N]. The Judge was entitled to clarify that evidence.

34. Third, as I pointed out to Mr Briddock, the Appellant would undoubtedly have complained and had cause to if the Judge had found against him in terms of credibility without giving him and his witnesses the opportunity to answer any apparent discrepancies in their evidence. As I have already remarked, it cannot be right that a Judge is bound to ignore evidential inconsistencies simply because they are not raised by the opposing party.

35. As I have already noted, the essential question is whether the proceedings have been conducted fairly. What fairness demands is fact sensitive. For the reasons I have given, I am satisfied that the procedure adopted by Judge Swinnerton was a fair one. Ground one does not disclose any error of law.

Ground two

36. The Judge's findings regarding the credibility of the Appellant's claim begin at [24] of the Decision with the words "[t]here are several aspects of the Appellant's account that concern me." Ground two is particularly critical of three aspects of the findings which follow which I deal with in turn.

37. The first aspect concerns the Appellant's contact with his family in Malaysia. The Judge's finding in this regard appears at [24] of the Decision as follows:

> "One of those aspects relates to the last contact that the Appellant had with his family in Malaysia. The account of the Appellant is that he came to the UK with his aunt [K], the younger sister of his mother, in February 2011 and that he lived with her for a few months before running away. In the asylum interview, the Appellant stated that he last had contact with his family in December 2011 when he spoke to his mother on the telephone. That was about 10 months after he had been in the UK. It was also about six or seven months after he had run away from his aunt [K]. Indisputably, the

> Appellant has given completely contradictory evidence in this respect. Regardless of the exact point in time when he last had contact with his parents, there is clearly a very significant difference between the Appellant stating that he has not had contact with his parents since leaving Malaysia (his evidence at the hearing), compared to having had contact with his parents up to almost one year after he had been in the UK when he spoke to his mother on the telephone. I accept that the Appellant was aged 15 at the time of arriving in the UK but I fail to see why the Appellant has given such completely divergent accounts in this respect. I refuse to accept that the age of the Appellant is a credible explanation. I also fail to understand how a child aged 15 travelling to a new country would not know with a reasonable amount of precision when he last had contact with his parents given that the end of contact with his parents is likely to be traumatic for any person of that age. I also fail to see any credible explanation as to why the Appellant would, on the one hand, maintain that the last contact that he had with his parents was in the UK and yet, on the other hand, state that it was while he was in Malaysia. If the evidence of the Appellant is to be believed, he travelled to the UK with his maternal aunt, lived with her for several months and during that time had no contact whatsoever with his family in Malaysia. I do not believe that evidence and I reject it as totally lacking in credibility."

38. The Appellant's pleaded ground in this regard again relies upon Mr Briddock's notes of the hearing. I cannot give those weight as such. However, I do not understand the point which is there made even if the notes are taken at face value. The Appellant was apparently asked when he last had contact with his family and answered that it was "[b]efore [he] went away". That followed a question whether he had any contact with his family since he had been in the UK to which he made clear that his answer was in the negative. He went on to say that he had contact with his aunt in February 2011. However, none of those answers differ from the account which the Judge records at [24] of the Decision.

39. Neither can the Judge's reliance on the asylum interview record be categorised as a failure to consider the evidence. The questions put to the Appellant during the interview in this regard are as follows:

> "Q17: When were you last in contact with your family in [Malaysia]?
> A17: 2011
> Q18: And was that before or after you arrived in the UK?
> A18: Do you mean telephone contact?
> Q19: I mean any kind of contact that you have had with your family in [Malaysia], when was the last time?
> A19: December, I think it was in December.
> Q20: And what year was that?
> A20: 2011.
> Q21: And who did you speak to?
> A21: My mum.
> Q22: And is there any reason why you have not had any contact with your family since this time?
> A22: I left my aunty's and ever since I haven't contacted them.
> Q23: But why is that?
> A23: I lost her contact details.

> Q24: But why have you not had any contact with your family such as your parents in [Malaysia] since 2011?
> A24: I feel that my family don't really want to see me."

40. As the Judge observes at [24] of the Decision, there is a discrepancy even within that account. Either the Appellant had no contact after he left his aunt's house in February 2011 or he had contact in December 2011. Both cannot be right. Both accounts differ from his evidence at the hearing that he had no contact with his family in Malaysia after he left that country.

41. The pleaded challenge to [24] of the Decision reads as follows:

> "17. It is not suggested that the FtTJ was not entitled to find against the Appellant on this point, but he did so without actually taking into account the answers given in cross-examination and in response to the Judge. It is far from as clear cut, as the FtTJ puts it, that *Indisputably, the Appellant has given completely contradictory evidence in this respect."*

42. I am afraid that the nature of this challenge did not become any clearer to me when developed orally. Mr Briddock accepts that there is a discrepancy in the evidence but appeared to say that this was not as clear cut because the Appellant was in touch with his aunt. If and insofar as the Appellant seeks to suggest that there was a misunderstanding about contact with family in Malaysia directly and via his aunt, that does not make any sense. The Appellant's case was that he had not had contact with his aunt since he left her home in February 2011. He was clearly speaking at interview about direct contact with his mother in December 2011. It is difficult to see how the discrepancy between that answer and his answer at the hearing that he had no contact since he left Malaysia is anything other than clear cut. Even if he had contact after he left via his aunt that still does not explain the discrepancy between having had no contact with her since February 2011 and having spoken with his mother in December 2011. The Judge was entitled to describe the evidence as "completely contradictory" in this regard. That is beyond dispute. It cannot sensibly be said that the Judge had failed to take into account evidence before him.

43. The second factual matter is what happened after the Appellant left his aunt's home in February 2011. The Judge deals with this aspect of the Appellant's case at [25] and [26] of the Decision as follows:

> "25. Another aspect of the Appellant's account that troubles me relates to his having run away from his aunt shortly after having arrived in the UK. At this point in time, during the first half of 2011, he would have been aged 15. At the hearing, the Appellant gave evidence that he did not know where he stayed with his aunt. He provided no credible explanation as to why he was unable to state where he had stayed with his aunt for several months. When I pressed him on this, he again stated that he did not know. Despite not knowing where he had lived in the UK and only having been in the UK for a few months, he maintains that he was able with no assistance (financial or otherwise) from anybody at all to go to Bournemouth, find

himself work and also find accommodation in Bournemouth immediately. I do not find that credible.

26. Whilst working in Bournemouth, the Appellant claims to have entered into his first same-sex relationship with a male named [K]. They worked in the same establishment and their relationship lasted a little over two years from mid-2014 until September 2016. Despite having lived in Bournemouth for a number of years by this time, the Appellant was unable to state where he lived with [K] despite being afforded a number of opportunities to do so at the hearing. No credible reason was offered by the Appellant for his inability to state where he had lived with [K]. The Appellant was aged about 21 when his relationship with [K] ended and had been living in the UK for five and a half years by that point in time. I fail to see why he would not be able to recall where he lived for about one year with his first same-sex partner given the significance of this to him given his claimed sexuality. I note also that no documentary evidence was made available to me of the Appellant's relationship with [K] despite the end of their relationship being only a little over three years ago. Additionally, in respect of this relationship, the Appellant stated that friends of his know that he was part of a loving couple with [K] and the Appellant referred to [F] as one of these friends who knew that he was in a loving relationship with [K]. [F] provided a witness statement dated 11.11.2019 for the purpose of the hearing (but could not attend the hearing) and makes no mention whatsoever of the Appellant's relationship with [K] in his witness statement. Had [F] been aware of the Appellant's relationship with [K], I fail to understand why he did not make any mention of this in his witness statement. The statement of [F] refers to having gone on a trip to Cornwall with the Appellant and a number of other people and thereafter going to clubs after which the Appellant told [F] that he was gay. Clearly, [F] would have already been aware of the Appellant's sexuality if he had, as claimed by the Appellant at the hearing, known of his relationship with [K]. Based on the available evidence and for the reasons stated above, I do not find that the Appellant was in a same-sex relationship with a male named [K]."

44. The pleaded challenge to these findings is that the Judge ignored that the Appellant said he could not speak English and therefore did not know his address. I was unimpressed by Mr Briddock's submission that the Judge has erred by finding that the Appellant did not know where he lived because all he said was that he did not know the address. The Appellant said that he lived in Bournemouth or Poole (although was not even specific in that regard). The point made by the Judge though is that the Appellant must have known where he lived with [K]. That is clearly a reference to not knowing the precise address. The Judge was entitled to find the Appellant's explanation to be implausible.

45. That finding also has to be read in context. As the Judge noted, the Appellant had, by the end of this relationship, been in the UK for over five years. The Judge did not consider it plausible that the Appellant would not know his address, particularly when that is put in the context of what is recorded at [25] of the Decision concerning the Appellant's claimed ability, less than a year following his arrival in the UK, to move to a different part of the country where he knew no-one and with no assistance or language ability.

46. Further and in any event the finding regarding the Appellant's relationship with [K] is disbelieved for other reasons as set out at [26] of the Decision. For those reasons and that the Appellant could provide no detail as to where he lived with [K], the Judge was entitled to disbelieve this aspect of the Appellant's account.

47. The third factual matter concerns the Appellant's current relationship with [N] and their living arrangements. They claim to be living with two other gay men. This aspect of the Appellant's account is dealt with at [28] of the Decision as follows:

> "The Appellant moved from the property of Uncle [M] to living with his current partner, [N], and two friends, [A] and [F]. At the hearing, [N] as well as [A] and [F] all gave evidence that they have lived together in a three-bedroomed property since 1.9.2019. No tenancy agreement was provided for the property and no other documentary evidence was provided that the Appellant or the three other occupants live at that property. No utility bills, bank statements or any documentation at all was provided to evidence that the Appellant or any of the other three occupants live at that property. I questioned [F] as to his accommodation history and he, very clearly, stated to me that he lived with Uncle [M] and the Appellant before moving to the property at [P] Street with the Appellant and [N] and [A]. When I pointed out to him the address on his current driving licence (effective 25.7.2019) of [Pa] Street, he sought to change his evidence stating that the address of [Pa] Street was a temporary address where he had lived in between living with Uncle [M] and moving to the property at [P] Street. I do not accept that explanation and I do not accept that [F] was telling the truth about where he lives. Quite the opposite. I found him to be entirely lacking in credibility. I do not accept that he lives with the Appellant at [P] Street and I do not accept his evidence that he, the Appellant and [N] and [A] all live at [P] Street. I found that to be a fabrication. I noted also that the driving licence of [A] likewise did not contain the [P] Street address. I do not find that the Appellant, [N], [A] and [F] live together."

48. It is said that this passage ignores the evidence of the witnesses that the tenant of the property is [N] who does not have a tenancy agreement either. The others in the house apparently said that they pay money to [N] who then pays the rent to the landlord. That there is no tenancy agreement may be understandable, particularly if some of those living at the property do not have legal status. However, as Mr Clarke pointed out, the Judge's finding is not based simply on an absence of a tenancy agreement but a lack of any documentary footprint of any kind in relation to those said to live at the property. The only documentary evidence which the Judge had did not support the witness testimony. The Judge was entitled to reach the conclusions he did based on a complete absence of documents showing that any of the four men live where they say they do.

Ground three

49. The third ground turns on a claimed absence of reasons. Again, there are three component parts to this challenge.

50. I begin with the Judge's findings at [28] of the Decision as set out at [47] above. Mr Briddock submitted that the Judge has not given reasons for disbelieving [F]'s

evidence. I reject that submission. The Judge noted the discrepancy between [F]'s oral evidence and the documentary evidence produced as to where he lives. The Judge recorded [F]'s explanation why that discrepancy exists. It is clear from the Judge's rejection of [F]'s evidence that he did not accept that explanation. He did not have to give any further reasons why he rejected the evidence in light of the discrepancy which clearly existed and taking into account [F]'s explanation for the discrepancy which the Judge rejected.

51. In order to understand the next criticism made of the Judge's findings it is necessary to consider what the Judge says at [27] of the Decision. After the Appellant left Bournemouth/Poole and returned to London, he says that he lived with Uncle [M], an elderly gentleman who, although the Appellant refers to him as uncle is not related to the Appellant. Uncle [M] did not attend to give evidence in the appeal nor did he provide a letter or statement to corroborate the Appellant's account as to his sexuality. The Judge dealt with this lack of evidence at [27] of the Decision as follows:

> "About one year or so after the end of the Appellant's relationship with [K], the Appellant's account is that he moved to London where he lived with a 75 years old male named Uncle [M] from about January 2018 until September 2019. [F] also moved in with them. The evidence of the Appellant's current partner, [N], is that he visited the Appellant at Uncle [M]'s property. The evidence of the Appellant is that Uncle [M] was aware of the Appellant's sexuality. Uncle [M] would, therefore, have been able to give evidence that the Appellant had lived with him prior to moving out in September 2019 and as to the Appellant's relationship with [N]. That said, no mention at all was made of Uncle [M] during the asylum interview in November 2018 even though the Appellant was living with Uncle [M] at that very point in time. Mr [M] was not called as a witness for this hearing (or the previous hearing of the Appellant in January 2019) and neither was any witness statement provided from Uncle [M] despite there being no indication at all given to me that the Appellant was on anything other than good terms with Uncle [M]. No credible reason was provided as to the lack of any evidence from Uncle [M] or for the lack of any evidence that the Appellant had lived with Uncle [M]."

52. The Appellant's grounds suggest that the Judge was not entitled to place weight on this lack of evidence as the Appellant had put forward evidence from four gay men who knew the Appellant to be gay. It is said that it is perverse for the Judge to have relied on the lack of evidence from this elderly gentleman. I disagree. Perversity is a high threshold. As I have already noted, the Judge clearly considered the evidence about where the Appellant had lived, at what time and with who to be an important aspect of the case. This gentleman could have provided evidence about the Appellant's address during a relevant period and also about [N]'s relationship with the Appellant. It is not suggested by the Judge that the Appellant was bound to put this gentleman forward as a witness, but he ran the risk that if the Judge disbelieved the other witnesses who are all said to be the Appellant's gay friends, then the claim would be rejected. Uncle [M] is not said to be a gay man. As such, he may be said to have less interest in the Appellant's case succeeding. The absence of his evidence is a matter on which the Judge was entitled to rely.

53. It is asserted that the Judge's erroneous treatment of the evidence has then influenced the Judge's finding about the Appellant's relationship with [N] which appears at [29] of the Decision as follows:

> "In respect of the Appellant's claimed relationship with [N], I have stated already that I do not accept that they live together. Their relationship is said to have started about 17 months ago in August 2018. They had not lived together since claiming to live together at the property at [P] Street. It follows therefore that I find that they have never lived together. I attach no weight to the evidence of [A] and [F] as to the relationship of [N] and the Appellant as I have not accepted their evidence that they share a property with [N] and the Appellant. As mentioned above, Uncle [M] could have provided evidence as to the recent accommodation history of the Appellant and, importantly, as to the nature of the relationship of the Appellant and [N]. No such evidence was provided or any credible reason as to why it was not provided. Having taken account of all the available evidence, I do not find that the Appellant is in a same-sex relationship with [N]."

54. It is asserted that there is a "domino effect" in the Judge's findings – in other words, the Judge found because he did not believe some of the evidence that all should be disregarded.

55. Mr Clarke understood this submission to be premised on the Judge having failed to consider the approach laid down in the case of Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367 ("Mibanga"). The "Mibanga duty" has recently been considered by this Tribunal in the case of QC (verification of documents; Mibanga duty) China [2021] UKUT 00033 (IAC). The guidance in that case reads as follows:

> "**The Mibanga duty**
> (2) Credibility is not necessarily an essential component of a successful claim to be in need of international protection. Where credibility has a role to play, its relevance to the overall outcome will vary, depending on the nature of the case. What that relevance is to a particular claim needs to be established with some care by the judicial fact-finder. It is only once this is done that the practical application of the "Mibanga duty" to consider credibility "in the round" can be understood (Francois Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367). The significance of a piece of evidence that emanates from a third party source may well depend upon what is at stake in terms of the individual's credibility.
> (3) What the case law reveals is that the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence; and, if the fact-finder's overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why that evidence has not brought about a different outcome."

Mr Clarke relied on that guidance as supporting the approach which the Judge had taken.

56. Mr Briddock confirmed that his case was not that the Judge had erred by finding against the Appellant on one aspect of his case and then disbelieving the whole for that reason. That was the error made in Mibanga. However, if that is not his case then it is difficult to understand the criticism being made.

57. In any event, I consider the point to be without merit. Central to the credibility of the Appellant's claimed relationship with [N] was the evidence of the Appellant and [N] himself. The Appellant sought to corroborate that evidence by evidence from two other men who it was said lived with [N] and the Appellant and therefore could attest to the genuineness of their relationship. The Appellant did not however rely on the evidence of another man who could also provide some evidence in that regard if the relationship were genuine as claimed. The Judge did not make any errors when reaching the individual findings about the testimony of those who did give evidence. He did not err in taking into account that Uncle [M] was not called as a witness. It is not therefore any form of impermissible "domino effect" to draw those findings together when reaching the finding that the relationship with [N] was not credible.

58. That brings me on to the final criticism made in ground three regarding the Judge's conclusions. Those appear at [30] and [31] of the Decision as follows:

> "30. I must now draw together the various points in this case in order to arrive at a decision. I have considered all the evidence in the round and I have highlighted a number of areas where the account of the Appellant troubles me such as the marked discrepancy in the Appellant's evidence as to when and where he last had contact with his family in Malaysia, the lack of credibility as to his account of fleeing from his aunt [K] aged 15 and without any apparent difficulty establishing himself in work and accommodation almost immediately in another part of the UK, the lack of evidence as to the Appellant's claimed same-sex relationship with [K], the lack of any evidence from Uncle [M] and the failure of the Appellant to refer to him in his asylum interview, the lack of credibility (particularly in relation to [F]) that the Appellant now lives with [N] (as a partner) and [A] and [F] in the same accommodation, as well as my having found that the Appellant is not in a same-sex relationship with [N].
> 31. Considering all the evidence in the round, I do not accept the account of the Appellant and I do not find that he is gay or that he has encountered any problems with his family or anybody else in Malaysia due to his sexuality."

59. In the grounds, the Appellant repeats a similar point to that made about the "domino effect" of the Judge's findings with which I deal above. It is said that the Judge here "merely repeats the points he has already made and uses them to reject the entirety of the Appellant's account".

60. The Judge's reasoning in these paragraphs has to be read in the context of the first words at [30] and the Decision read as a whole. The Judge is here drawing together his earlier reasoning. As such, it is scarcely surprising that he would record what has led him to reject the credibility of the Appellant's case. He had reached those earlier

findings on consideration of the evidence on each element of the case. He was not obliged to repeat the reasons why he had made those earlier findings. His findings and reasoning for reaching those findings are explained in the earlier paragraphs. As I have concluded, there is no error of law made by the Judge when reaching those findings.

61. For all of those reasons, I conclude that there is no error of law in the Decision, and I uphold it.

DECISION

The Decision of First-tier Tribunal Judge K Swinnerton promulgated on 8 January 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 30 March 2021