



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

Appeal Number: AA/02513/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 28 September 2015**

**Decision & Reasons
Promulgated
On 22 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

C A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanki, Counsel instructed M & S Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Sri Lanka national who was born on 22 January 1981. He applied for asylum on 19 September 2014. That application was refused on 27 January 2015 by the Secretary of State. The basis for the refusal is set out in that letter. It is the appellant's claim that he is a homosexual and he had come to the realisation that he was gay during his stay in the United Kingdom. The Secretary of State did not find his account of his relationship to be credible, did not accept that there were any threats emanating from Sri Lanka on the basis of his sexuality and did

not accept that his partner who was a dependant on his asylum claim had given a true account of his sexuality. The decision was made therefore to refuse asylum, to refuse the grant of humanitarian protection under paragraph 339C of the Immigration Rules and to refuse the appellant's application under paragraph 276ADE (1) of the Rules. Removal directions were then given to Sri Lanka on 28 January 2015.

2. The appellant appealed that decision and the matter came before First-tier Tribunal Judge Ghani who dismissed the appeal in a decision promulgated on 3 June 2015. To summarise, it was not accepted that the appellant had given a credible account in relation to his sexuality and the evidence of his partner was also rejected. He rejected the appellant's case that he was at risk in Sri Lanka and found inconsistencies in the evidence both in relation to the appellant and his partner's sexuality and in relation to the threats that were said to have been made against them. He also found that internal flight would be not unduly harsh or unreasonable. He dismissed the appeal under Article 8.
3. The appellant sought permission to appeal against that decision. The grounds were drafted by Counsel who represented the appellant at the hearing and assert that several requests for an adjournment were made in the course of the hearing. It is asserted at Ground 1 that the First-tier Judge's refusal of the application for an adjournment was unfair. An application for an adjournment had been made in order to present evidence from a witness who was on holiday during the hearing. It is said that in refusing the adjournment request the only basis for the refusal was that the appellant was aware of the issue since the date of the refusal, however the First-tier Judge did not consider whether the evidence was cogent and relevant and there was no consideration of its impact in the context of the asylum claim. It is also said that the appellant requested an adjournment on the basis of threats on Facebook that were not translated and that the appellant's case was therefore not given the required anxious scrutiny in asylum claims. The other grounds assert that there are multiple errors of law in the decision and there is a lack of anxious scrutiny.
5. Permission to appeal was granted by First-tier Tribunal Judge Reed on 3 July 2015. It is said in the grant of permission at paragraph 3 that the issue of the appellant's sexual orientation was the cornerstone of the appeal. The proposed witness was in Sri Lanka but apparently he had confirmed his willingness to attend a hearing on his return and drawing adverse conclusions on the appellant's sexual orientation founded on the lack of any friends being prepared to come and give evidence in support was arguably in error of law. First-tier Tribunal Judge Reed noted that it was clear from the Record of Proceedings that the witness would be back in the UK on 17 June 2015 which was just two weeks after the promulgation of the decision.
6. The matter therefore comes before the Upper Tribunal to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal and if there is such an error what to do about it. I

heard representations from both parties. Ms Solanki served a skeleton argument.

7. The appellant produced an email from Counsel who appeared at the hearing before the First-tier Tribunal and Mr Clarke produced a note of the hearing from the Presenting Officer. There was no factual disagreement between the parties as to what occurred in relation to the applications for adjournments. The email from the representative for the appellant states that she made applications for an adjournment described at Ground 1. The first application was an order for a material witness to attend and for a country expert to be instructed. There was a further issue as to the presence of Facebook warnings to the witness by the appellant's wife. The latter was shown to Counsel and to the First-tier Tribunal on a screen in a language she could not understand. The content was described in evidence. She applied for an adjournment on that basis. She confirms the description of matters at paragraphs 18 to 19 of the grounds are correct.
8. The note from the Presenting Officer records that the appellant's representative requested several adjournments during the hearing firstly in relation to a witness who was in Sri Lanka and also in regard to the request for an expert's report. She also recalls that there was a second application for an adjournment in the afternoon in relation to the threats recorded on a Facebook page.
9. The submissions of the representatives at the hearing before me were as follows. Ms Solanki submitted that the refusal of the adjournments was unfair and the approach to credibility was fundamentally flawed. She submitted that there was a witness who would have returned from holiday two weeks' after the hearing. There was a second adjournment application on the basis of the Facebook threats as they were not translated. The judge dealt with this at paragraph 36 of the decision. The reason for rejecting the application was that the appellant had known about the hearing since 27 January 2014. The Rule 24 notice said that this was a badly prepared case. Ms Solanki's submission in respect of that was that it was well-established that an appellant should not be prejudiced by an error of their representatives. The major difficulty with the judge refusing the application for an adjournment for a witness to attend was that the reason for finding against the appellant was the fact that no witness had come to support him in relation to the assertion that he was gay. Potentially it would not be an error of law if it had not been held against the appellant.
10. The second difficulty, in her submission, was that the First-tier Tribunal appeared to have forgotten about the Facebook page and did not record the adjournment request in respect of it. The judge had not referred to the Facebook messages and had not explained that the appellant requested time or taken into account the appellant's explanation. The appellant had been denied the opportunity to present evidence. The explanation for the absence of that evidence was that the appellant was not properly advised.

11. The second ground was the First-tier Tribunal approach to credibility. Paragraphs 39 and 40 of the decision referred to guidance from the Home Office and guidance from the UNHCR in relation to how to assess the claims from individuals claiming that they were gay. The judge had concluded that the appellant's account lacked detail and appeared to take against the appellant and his partner because they had been only attracted to each other. He said that the claimant's sexuality had been undermined. Ms Solanki said she referred to the guidance in her skeleton argument and it was clear that the First-tier Tribunal Judge's approach was not correct. It was not necessary that he had been in a previous relationship the gender codes were different in different societies. The appellant's explanation had been that it was the result of cultural traditions.
12. The First-tier Tribunal had concluded that the moment that the appellant became intimate with his partner would be momentous and the guidance said that this was not necessarily so. There was a discrepancy and the judge had found that there was no credible explanation as to why his partner would tell his wife he was having an affair. The judge had not dealt with the explanation in coming to an adverse credibility finding. The judge found it material that the appellant had not thought of his sexuality in the past. That finding was a material error. The judge had also erred in rejecting the photographic evidence. She asked for a remittal and a full re-hearing.
13. Mr Clarke submitted that no material errors were disclosed by the determination. The request had been made on the day of the hearing. In the case of **BT (Nepal)** where an appellant criticised his solicitors it was incumbent upon him to provide evidence that he had approached his solicitors and that it had been put to them. The appellant's solicitors had not dealt with this and it was not possible to make a finding of fact without those matters having been put to his solicitors. A point was raised at the hearing that there were four months for this issue to be raised. There had also been a Case Management Review hearing and the existence of the witness was not raised at that point. It was therefore absolutely appropriate for the First-tier Judge to dismiss the application for an adjournment. Fairness went both ways. No other witnesses were there on the day of the hearing despite the appellant's evidence that there were other witnesses to the relationship.
14. Regarding the second request for an adjournment it appeared to have been 2:00pm in the afternoon. The threats that were relied on dated from 2012, the information on the Facebook page was not translated and the Procedure Rules precluded the judge from taking this evidence into account and there was an absence of any corroboration. According to the Presenting Officer's note of the hearing there was nothing faxed over and no message on a phone. There was also nothing to corroborate the threats asserted to have been made from the appellant's parents. It was a long stretch to argue that there was procedural unfairness given there was no mention at the Case Management Review, nothing from the solicitors

and in the circumstances there was no error in refusing the adjournment request.

15. Turning to the credibility arguments he referred to paragraph 13 of the appellant's skeleton before the First-tier Tribunal. That skeleton relied on the fact that feelings and experiences were more likely to assist in an assessment of sexuality than the focus on practices. He submitted that the judge had provided comprehensive reasons by reference to Home Office guidance and UNHCR guidance. The first point was in relation to lack of self-realisation. There were lots of "mays" and "buts" in the guidance but no particular point was determinative and you could take each in the round. The judge set out at paragraph 41 of his decision the correct test and was mindful of the guidance. He set out also at paragraph 39 that he was aware of the "mays" and "buts" but did not take any one particular point to be determinative. The appellant was now shying away from the things that he relied on in the assessment of credibility.
16. The First-tier Tribunal looked at the lack of detail. The appellant had not said it was difficult for him to be open about his sexuality. His narrative account was not that he could not express his feelings. The evidence in relation to Sri Lanka was that there was stigma. He had the opportunity at the hearing of providing more detail.
17. The judge took in one of a number of elements and found that there was no thought of being gay before 2010 but that was not determinative. The judge found at paragraph 45 that the appellant never thought of sexuality before the relationship and the only explanation that he could give was that he liked his partner. At question 41 of his asylum interview he said that he never felt different. That was another matter taken into account by the judge but again it was not concluded to be determinative. It was appropriate for the judge to find that the appellant's inability to pinpoint a time from when he went from friendship to intimacy was appropriate in relation to his findings on credibility. It was a proper assessment for him to find that this moment would have been momentous. The judge also looked at other inconsistencies, the different accounts of what occurred in relation to birthday drinks and the credibility in relation to how his wife was informed. His wife had found out from another house mate but that had not been discussed with his partner and that was not a credible assertion. It was difficult to see how the judge could not identify that as being important.
18. At paragraph 47 there was another issue which was the divorce papers did not indicate sexuality as a ground for divorce. The appellant's evidence was that he had never had previous feelings towards men. He failed to reflect on life in Sri Lanka and they were matters that the judge was entitled to take into account. He looked exhaustively at all of the elements it would have been inappropriate if he had not looked at them. Another complaint under the same first ground of appeal was that the context of sexuality was not taken into account. Just because the relationship was not long-term there was no explanation as to why it was

not going to be long-term, it was entirely out of character and it would have created a greater shockwave that would have been enormous and monumental. The absence of previous relationships was significant but not determinative.

19. The appellant did not provide any cultural context because he could not pinpoint when he had the feelings. No context had been identified. The second point complained about was that the judge did not take into account the context. The length of the relationship was entirely relevant. That in a backdrop would be more memorable and profound. It is said that it is irrational in the context of the cuddles getting more serious.
20. The fourth point was the failure to evidence the appellant and his witness's explanations. This related to the issue of drinks on a birthday, the appellant's wife and his return to Sri Lanka being inconsistent with his fear. The judge set out his findings in great detail. He expressly referred to the fact that they were speaking about different parts of the day and in relation to the wife he set out why it was that the wife was not told. He set out the interview evidence at paragraph 9. He looked at evidence regarding the appellant's friend, "C". There was a lack of verification in relation to this as there was no witness statement from "C" and it was open to the judge to look upon this suspiciously. The explanations put forward were never going to be determinative without substantial corroboration and the judge set out the evidence in relation to each of the credibility findings and came to a conclusion in the round. He said there was an inconsistency and he made adverse finding on the inconsistency. He was mindful of the explanation and did not have to accept it.
21. Ground 5 related to a failure to assess the account and ground 6 related to gangsters and again it was open to the judge to make adverse findings. There was no new evidence at the hearing as to the threats and the judge was entitled to make a finding on the inconsistency. He found that the evidence was not satisfactory. The application had changed his evidence later in the date. In conclusion, if the credibility findings were erroneous it may be that findings in relation to risk were wrong but there were very clear findings the appellant could go to Colombo and the judge had to apply the case law.
22. In response Ms Solanki said it was the same solicitors who represented the appellant before the First-tier Tribunal who were instructed today and Counsel put that in an email. They accepted the appellant's allegation in relation to the poor preparation of the case. Indeed they would not allow Ms Solanki or her predecessor to attend court if that were not so. Counsel had settled the grounds and solicitors were fully aware of what was being said. The application had not been made at the Case Management Review. The important point was what fairness demanded. It demanded that the appellant be given a chance to produce the evidence. With regard to Mr Clarke's submissions in relation to credibility he said the issues were not determinative but the judge did take them as determinative against the appellant. The appellant had described his difficulties in relation to intimacy and described himself as shy. In his

statements and his interview he referred to culture, religion and traditions as being an issue in this case and the judge did not deliberate on those explanations. He needed to give reasons for his decision and the appellant needed to be able to understand why he had come to this decision. "C" had disclosed the relationship to his wife and he could not in those circumstances be expected to obtain a witness statement.

23. According to B26 of the respondent's bundle many people knew about the relationship. It was a failing on the part of the solicitors to get the witnesses to court. He did not mention that they were powerful and influential but had said that there were gangsters in the area and in his witness statement they had a lot of influence. In his oral evidence he had explained why they were like gangsters due to the influence they had. There were material errors of law.
24. I reserved my decision in relation to whether or not there was an error of law in the determination of the First-tier Tribunal and determined that the correct forum would depend on whether or not I found there was unfairness.

Decision and reasons

25. It is accepted by the appellant that no adjournment request was made prior to the hearing in relation to the appearance of a witness who was said to be able to substantiate the appellant's claim that he was gay. Counsel produced at the hearing before me two witness statements in relation to the proposed witness and another witness. I am not able to take those into account in determining whether there was an error of law because they were not before the First-tier Tribunal.
26. The Tribunal Procedure Rules 2014 provide the power to postpone or adjourn a hearing under the Case Management powers in Rule 4(3)(h). There is no specific test set out in that Rule. In exercising its powers, the Tribunal must seek to give effect to the overriding objective when it exercises any power under the Rules. The overriding objective set out in Rule 2 is to deal with cases fairly and justly.
27. In the case of **Nwagwe (adjournment - fairness) [2014] UKUT 00418** the President, Mr Justice McCloskey held as follows:

"If a Tribunal refused to accede to an adjournment request such a decision could in principle be erroneous in law in several respects. These include a failure to take into account all material considerations permitting immaterial considerations to intrude, denying the party concerned a fair hearing, failing to apply the correct test and acting irrationally. In practice in most cases the question will be whether refusal deprived the affected party of his right to a fair hearing. Where a general refusal is challenge on fairness grounds it is important to recognise that the question of the Upper Tribunal is not whether the First-tier Tribunal acted reasonably, rather the test to be applied is that of fairness. Was there any deprivation of the affected party's right to a fair hearing"

28. The first request for an adjournment was dealt with at paragraph 36 of the decision of the First-tier Tribunal where it is said “at the commencement of the hearing the appellant’s representative requested an adjournment on the basis that there was a witness who would be available to give evidence but at the date of the hearing the witness was in Sri Lanka”. The reasons recorded by the judge for refusing that request were as follows:

“I declined the request because I find that the appellant has known since 27 January what the issues are. The representatives also suggested there may be an expert’s report that could be made available to the court. I find that the appellant has had sufficient time to prepare and therefore I declined the request for an adjournment.”

29. What is not considered there is the potential corroborative effect of the evidence and whether considerations of fairness required an adjournment for the witness to attend. The refusal of the request for an adjournment may not have been material had the judge not made credibility findings related to the absence of supporting witness evidence. However, he found at paragraph 47 of the decision that “even though the appellant alleges that some of their friends know about their relationship no one has been prepared to come and give evidence in their support”. This is clearly therefore one of the reasons that he decided the appellant was not credible in relation to the core element of his claim, namely that he is a homosexual.
- 30 I conclude that in circumstances where he has held the absence of witnesses against the appellant but has refused to allow the appellant to rely on witness evidence by way of refusal of an adjournment, such finding is unfair. It is material because it inevitably and inarguably impacted on his assessment of the appellant’s credibility in relation to his sexuality. In the circumstances I find that his findings of fact in relation to the appellant’s credibility cannot stand. Having regard to the nature of the judicial fact-finding that must take place, by reference to Part 7.2 (a) of the Practice Statement of the Immigration and Asylum Chamber of the First-Tier Tribunal and Upper Tier Tribunal regarding the remittal of hearings this case should be heard de novo before the First-tier.

Notice of Decision

The appeal is allowed.

I set aside the decision of the First-tier Tribunal and remit it to the First-tier for rehearing. No findings are preserved.

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 their 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

Deputy Upper Tribunal Judge L J Murray