



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/04629/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 11th December 2015

Decision & Reasons Promulgated
On the 5th January 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR A.P.P.D
(Anonymity Direction made)

Claimant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Harris (Counsel)

For the Respondent: Mr Norton (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge M.A.Khan promulgated on the 1st September 2015 in which he rejected the Appellant's appeal on asylum grounds and under Articles 2, 3 and 8 of the ECHR.

Background

2. The basis of the Appellant's claim is that he should be recognised as a refugee under

the 1951 Convention relating to the Status of Refugees, on the basis that he has a well-founded fear of persecution in Sri Lanka, as a result of him being gay. The Appellant's initial claim for Asylum, Humanitarian Protection and/or for relief under the ECHR was rejected in a refusal letter dated the 6th March 2015. The Appellant appealed that decision to the First-tier Tribunal, and that appeal was heard by First-tier Tribunal Judge M.A. Khan in his decision promulgated on the 1st September 2015, in which he dismissed the Appellant's appeal.

3. The Appellant sought to appeal that decision to the Upper Tribunal and in the grounds of appeal, it is argued that there were inadequately reasoned credibility findings made by the First-tier Tribunal Judge and that the Judge's findings that both witnesses were "vague and evasive" was inadequately reasoned, as was the Judge's finding that the Appellant had made contradictory and inconsistent statements and had changed his version of events. It is argued that the finding of the First-tier Tribunal Judge at [43] that there is a "large gay community in Sri Lanka and in particular in Colombo where they have little problem with the authorities" is unsupportable, and that the finding of the Upper Tribunal in the case of LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT that there is "a significant population of homosexuals and other LGBT individuals in Sri Lanka, in particular in Colombo" did not equate with there being a large gay community and the community has connotations, not implied by there being a significant population.
4. In ground 2 it is argued that the Judge made a flawed credibility finding regarding the Appellant's sexuality at [42], wherein the First-tier Tribunal Judge found that "the Appellant was unable to simply explain his feelings as a gay person instead he went on to give details of his sexuality. Again with respect to Mr Spurling's submissions, the Appellant was asked to explain his feelings as a gay person, he simply failed to do so. I find that had he been a genuine gay person as he claims and been in gay relationships in Sri Lanka, South Korea and the UK, he would have been able to describe his feelings in the interview. The fact that he was unable to do so, indicates that the Appellant has adopted a gay posture rather than being an actual gay person. I therefore do not believe the Appellant that he is a homosexual gay person."
5. It is argued by the Appellant that throughout his asylum interview record he had given examples of where he had described his feelings between questions 51 and 117 and had also described his feelings within his witness statement. It is argued that the Judge's decision in this regard that the appellant had failed to explain his feelings was contrary to the evidence and amounted to a serious error because it led to a finding that the Appellant was not gay, which went to the core of his claim.
6. Permission to appeal was granted by Judge of the First-tier Tribunal Nicholson on the 29th September 2015 on the ground that the First-tier Tribunal Judge had stated specifically that he found that the Appellant was not gay because he had been unable to express his feelings as a gay person despite the Appellant saying that there were numerous examples of him expressing his feelings as a gay person, such that there was an arguable error of law. Although Judge Nicholson did not refuse permission on ground one, he stated that although the Judge had not set out the inconsistencies

in the findings, when the decision was read as a whole it was quite clear where they were.

7. In her oral submissions before me, Miss Harris argued that the Judge had materially erred at [42] of the determination and that he had given examples of where he had explained his feelings as a gay man, and that the Judge's finding that he had failed to do so, was simply wrong. She argued that he had expressed his feelings of how he had feared being shunned, had an "kind of lust" and how he had not been able to develop love for the opposite sex, she argued that the Appellant could not realistically be expected to do more and that this was an error of law that stemmed from an error of fact. She argued that an error in this regard was material, and that it may have affected the Judge's findings on the credibility of the Appellant on other matters, in respect of matters such as the existence of an arrest warrant, as this would be a significant risk factor she argued, if the Appellant were to be returned to Sri Lanka.
8. She further argued in respect of ground one that the Judge had not set out examples of the inconsistencies that he found was said to have existed, and the Judge she argued had failed to give adequate and sufficient reasons. She further argued that the Judge had not given examples where the Appellant or his witness had been vague and evasive. She argued that the case should be remitted back to the First-tier Tribunal for rehearing. She further sought to argue that there was a difference between there being a community of gay people in Colombo, and there being a "significant population".
9. In his submissions on behalf of the Respondent, Mr Norton sought to argue that if one only looked at the first 5 ½ lines of paragraph 42, this may cause concern, but when looked at the case throughout, the Judge had applied the correct standard of proof, had properly summarised the evidence and properly recorded the submissions and that the Judge had found significant credibility issues, given the inconsistencies in the Appellant's evidence and that there had been clear findings of inconsistencies in respect of the core events regarding the attacks to which he was said to have been subjected to. He argued the Judge at [39] did not accept the Appellant had failed to mention his detention on the advice of a lawyer or that he would not have mentioned the warrant in his screening interview or have sought to obtain the copy of the warrant until July 2015. Further, he argued the Judge had found that the documents in the police report stated the Appellant was wanted for in connection with terrorist activities rather than a result of him being gay. Mr Norton argued that the Appellant being subject to persecution was found to be incredible by the Judge. However he argued that if there was an error of law, the case should be remitted back to the First-Tier Tribunal, not as a de novo hearing, but simply to determine whether he was gay, rather than whether or not he was at risk. Mr Norton further argued that if there is a significant population of gay people in Colombo, this would amount to a community and that the Judge had spelt out his factual findings between paragraphs 38 and 41 of the decision.

My Findings on Error of Law and Materiality

10. The First-tier Tribunal Judge in this case clearly found that at [36] that the Appellant's evidence before the Tribunal's was vague and evasive and that he had continued to make contradictory inconsistent statements throughout the oral hearing, changing aspects of his case in relation to what he had previously stated in his screening interview, the asylum interview and his SEF statement. If the Judge's impression was that the Appellant's evidence was vague and evasive, I find that it was incumbent upon him to so state, but although the Judge has given clear examples between [37] and [41] as to where the Appellant had made contradictory and inconsistent statements and given sufficient reasons which were adequately explained within those paragraphs as to why he rejected the Appellant's accounts of the attacks having taken place on him, his detention in Sri Lanka and the existence of the arrest warrant and the fact that the Judge found the Appellant's evidence to be contradictory and inconsistent did not necessarily mean that the Appellant was being evasive or vague. The fact that the Judge appears to combine the two varying concepts, but without giving examples as to how the evidence was vague or evasive, as opposed to simply being inconsistent and contradictory, has not been adequately explained. A witness' evidence maybe contradictory and inconsistent, without being vague or evasive, and vice versa, and no proper explanation has been given for the findings of the Appellant's evidence before the Tribunal was vague or evasive. I do find that the Judge's find in this regard was inadequately reasoned.
11. However, the more significant error I find lies at [42] of the decision of the First-tier Tribunal Judge. His finding that the Appellant was simply unable to explain his feelings as a gay person and instead he had given details of his sexual activity and that he had simply failed to explain his feelings as a gay person and that had he been a genuine gay person as he claims and being in gay relationships in Sri Lanka, South Korea and the UK he would have been able to describe his feelings in the interview and the fact that he was unable to do so indicated that he adopted a gay posture rather than being an actual gay person, such that the Judge did not believe that the Appellant was a homosexual gay person, I find to be contrary to the evidence and inadequately reasoned. The Judge in reaching the finding that the Appellant had failed to explain his feelings of a gay person, has clearly failed to take into account the answers given by the Appellant in interview, including at question 51 where he described being fearful of being shunned by his society; the Appellant's answer to question 66 when asked specifically "tell me how you felt around the other boys at this time?" when the Appellant had answered "at some point I realised that I liked the boys and had a feeling for them. It developed a kind of lust in my mind". Further, the Appellant at question 67 when asked to describe how he felt around the other boys had stated clearly that "I could not develop a love or affection to the opposite sex and having seen the boys and their movements and their behaviour I started liking them and wanted to be physically united with them" the Appellant had also stated in answer to question 70 that "when I was liaising with boys, I had a feeling of love". There is no evidence of the First-tier Tribunal Judge having taken into consideration this relevant evidence on this issue.

12. Further, in his statement at paragraph 6 the Appellant had stated how he had liked looking at some of boys at school and how it made him feel shy and at paragraph 7 that he had become aware that for some people he felt desire as well as just friendship and the people he found attractive were always boys and that he had never had those kind of feelings about girls. It is therefore clear and I find that the Appellant had sought to describe his feelings as a gay man in interview, and had gone on to further explain those feelings within his witness statement. The Judge's finding that the Appellant had failed to describe his feelings as a gay man, has not been adequately reasoned and without clear reasons for that finding, appears to be unsupported by the evidence, given the answers the Appellant did in fact give in interview. I therefore find that the Judge has failed to take account of material evidence in this regard, and that his reasoning in this regard is inadequate and insufficient.
13. Given that this error does amount to an error of law and was the basis for the First-tier Tribunal Judge finding that the Appellant was not a homosexual gay person and had simply adopted a gay posture rather than being an actual gay person at [42], although the Judge has given reasons for rejecting the Appellant's account regarding the two attacks said to have taken place against him, and for rejecting his explanation for not having mentioned his detention or his failure to obtain the arrest warrant earlier or its relevance, given that the Judge when considering credibility, has to consider the evidence whollistically, I do not find that the Judge's error regarding the question as to whether or not the Appellant had described his feelings as a gay person and as to whether therefore we was in fact gay, can simply be looked at in isolation, and that this error would not have possibly influenced the Judge's other findings. Although the question as to whether or not the Appellant would be at risk as the result of him being gay, as opposed to the question as to whether or not he is gay, are separate questions, the Judge's findings that the Appellant was not gay, may well have influenced his assessment of the relevance of the inconsistencies and the explanations given by the Appellant regarding the risk he faced on return.
14. I therefore do consider that the errors in the decision of the First-tier Tribunal Judge, both in terms of him failing to provide adequate reasons as to why he said that the Appellant's evidence was vague and evasive, as opposed to being contradicting and inconsistent, and in particular his error in respect of his consideration as to whether or not the Appellant had described his feelings as a gay person at [42], I do consider to be material errors of law. I do not consider that in light of these errors, the First-tier Tribunal Judge's findings in respect of risk should remain, as clearly this question has to be considered in light of the primary question as to whether or not the Appellant is gay. I therefore do find that the First-tier Tribunal Judge's decision does contain material errors of law, should be set aside and that the case should be remitted back to the First-tier Tribunal for rehearing de novo on all aspects of the case.

Notice of Decision

The decision of First-tier Tribunal Judge M.A.Khan, containing material errors of law, is

hereby set aside;

The case is to be remitted back to the First-tier Tribunal for rehearing, to be heard by any Judge other than Judge of the First-tier Tribunal M.A.Khan;

In order to secure the anonymity of the Appellant in these proceedings, I do order that the Appellant be granted anonymity. No report or other publication of these proceedings or any part or parts of them name directly or indirectly identify the Appellant. Reference to the Appellant may only be by use of his initials but not by name. Failure by any person, body or institution whether corporate or unincorporated, including the parties, to comply with this direction may lead to proceedings for contempt of court. This direction shall continue in force until the Upper Tribunal or the Court of Appeal revokes or varies it.

Signed

Dated 14th December 2015

A handwritten signature in black ink, appearing to read 'RFMcGinty'. The letters are stylized and somewhat cursive.

Deputy Upper Tribunal Judge McGinty