



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/00416/2017

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Royal Courts of Decision and Reasons
Justice Promulgated
On 7th August 2017 On 30th August 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**[S M]
(Anonymity Direction Made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, instructed by Taj Solicitors.

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal asserted that the First-tier Tribunal Judge expressed his own personal view in relation to the asylum claim and at the outset of the hearing made prejudicial comments which deprived the Appellant of a fair hearing. According to the appellant's representative the First-tier Tribunal Judge's remarks to the appellant's legal representative at the hearing were as follows;-

'Everyone come to Harmondsworth become homosexual and make asylum claim which I deal with mainly on day by day basis. Mr S does your client have anything new for his asylum claim'.

2. There were further grounds added to the challenge to the decision such that (ii) the judge placed too much weight on the letter of the appellant's wife particularly as she was not present at court. The judge failed to appreciate and give weight to the consistency of the appellant's evidence and failed to appreciate that the appellant had *'never wanted to live a gay life and always wanted to reconcile with his wife as a last try'* (iii) The judge erred in his assessment of the second witness, and uncle of the appellant who was found to be credible; his evidence was merely dismissed as being 'hearsay' and 'from third parties' and therefore it was 'possible that he has simply been duped' (iv) the judge applied the wrong standard of proof and ignored the Home Office policy guidance as to how to approach such claims.
3. The appellant is a national of Bangladesh and he claimed he could not return to Bangladesh on the basis of his homosexuality. He entered the UK with entry clearance as the spouse of a British citizen in October 2012. In December 2012 the spouse informed the Home Office that the appellant had left her and the marriage had broken down. The appellant's leave was curtailed in 2013. On 28th January the appellant applied for leave to remain in the UK asserting that there had been some misunderstandings. The application was refused on 16th March 2015 with no right of appeal. On 16th November 2016 the appellant was encountered by the police as an overstayer, detained and again he stated that he wished to reconcile with his wife and could not return because of his poverty. On 22nd November 2016 he claimed asylum.
4. In a determination dated 17th February 2017 the Judge of the First Tier Tribunal dismissed the appellant's appeal on all grounds
5. Permission to appeal was granted by Upper Tribunal Judge McWilliam who noted that it was arguable that the comments made by the judge at the hearing gave rise to a reasonable apprehension of bias. The judge was invited to submit his comments. The representative at the First-tier Tribunal was also invited to submit a witness statement.
6. Accordingly Mr S withdrew from representation and submitted a witness statement confirming that the judge made the comments outlined above at the outset of the hearing. Mr S confirmed that he did not make an application to the court to disqualify the First-tier Tribunal Judge on the same grounds as *'this was because the Ftj immediately after the above*

comments informed me that it was his general observation of this type of cases as he deals with them on daily basis (sic)'.

7. The judge was invited to comment on this application and I record in full his remarks regarding bias

'Thank you for your letter of 19 June 2017 and enclosures. I regret that I have little independent recollection of the hearing beyond what is noted in the record of proceedings which is reasonably detailed.

I can however say with absolute certainty that I did not make the specific comment attributed to me by Mr S. For one thing it displays a poor grasp of English which is my native language and more importantly I accept that such a comment would inevitably lead to a perception of bias.

That being said it is my general practice to conduct a pre-hearing introduction in each case where I explain to the Appellant my function and the independence, introduced the Home Office Presenting Officer and outline the issues arising in the case having agreed the same with the representatives. Although it is not set out in full in the record there is a note at the beginning which suggests that this is what I did here.

Where an Appellant's sexual orientation is in issue I usually explain to the Appellant where the burden of proof lies and that he/she may be asked some personal questions. I also alluded to the difficulty involved in determining an appellant's sexual orientation in effect paraphrasing some of what is said at paragraphs 62 to 65 of my decision and explaining that my ultimate decision will turn on an assessment of the Appellant's overall credibility.

Whilst I have no specific recollection it is likely that I would have discussed at the outset some of the evidential issues arising in this appeal. Here the appellant had made 2 settlement applications as a spouse and a leave to remain application in the same category and when encountered by police as an overstayer had told them that he was seeking to reconcile with his wife. He made no reference to being gay. He first advanced his claimed based on sexuality only after he had been detained.

*It is the case in that in the context of my opening remarks I often make reference to the prevalence of opportunistic claims as I do in paragraph 65 of my decision. **I therefore accept that in the course of my introduction in this appeal it is likely that I***

would have made reference to the prevalence of such claims arising at Harmondsworth where I sit on a regular basis. However for obvious reasons I always preface my remarks by stating that I am not suggesting that this is such a case but...'

It is unfortunate if my opening remarks have given rise to a perception of bias however practice has never been the subject of any previous complaint and I note that no complaint was made by Mr S in the course of the hearing or in its immediate aftermath. His recollection of my precise remarks is however faulty'.

8. The notes from the judge then proceed to address a presumption that the application for permission to the First-tier Tribunal asserted that the judge entered into the arena with regard cross-examination.
9. At the hearing before me the contemporaneous notes of the two representatives at the First-tier Tribunal Judge were submitted. Ms I drew my attention to page 9 of Mr S notes. There is a reference at question 8 of the judge's questions where he states

'I am not making any finding I see people every week from Pakistan/Bangladesh and they say gay/when in detention Why should I believe you lied in 2014 applications. The Dec 2014 application'

10. Ms Iqbal submitted that overall there could have been a perception of bias. She cited the notes of Mr S and made the point that he was recording a matter in shorthand at the hearing. That was not a reflection of the judge's English. She also relied on the further grounds of appeal particularly that the judge failed to give adequate reasoning when rejecting the evidence of the uncle who was a witness. There was a complete section of judge's questions in the record of Mr S notes from which question 8 above was extracted.

Conclusions

11. Although the copy of notes from Home Officer Presenting Officer were made available to me at the hearing those notes shed no light on this matter. The ground relating to the judge's questioning or 'descending into the arena' did not appear to be part of the grounds or grant for permission.
12. The President of the Upper Tribunal has set out some guidance with respect to the approach in cases asserting bias, in **Sivapatham (Appearance of Bias)** [2017] UKUT 00293 (IAC) as follows

'(i) Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.

(ii) Provisional or preliminary judicial views are permissible, provided that an open mind is maintained.

(iii) An appellant does not require the permission of the tribunal to give evidence. This does not prevent the application of fair and sensible case management and, further, is subject to the doctrine of misuse of the tribunal's process'.

13. In the decision under challenge is clear that the judge embarked at paragraphs 62 to 65 on some general observations in relation to asylum claims. The judge gives his views on statistics of homosexual people in any given country as being the same, he adds that sexuality cannot be determined by reference to a checklist of factors and that it is not always appropriate to invoke delay in claiming asylum as the basis for undermining the credibility of an appellant's claim because *'for cultural reasons many appellants are likely to be reluctant to discuss their sexual orientation and sexual behaviour openly with others'*.

14. The judge then, however, proceeded at paragraph 65

'Equally my experience indicates that a corollary of the persecution of sexual minorities in some countries has been an increase in opportunistic asylum claims in the UK based on claimed sexual orientation'.

15. This comment was made immediately prior to the adverse credibility finding that the appellant was not a gay man [66].

16. This application for permission to appeal signals the dangers of making general observations and comments at the outset of any hearing and at the outset of deliberations in a determination. It is one thing for the judge to explain procedure or to identify areas of the appellant's evidence which needs exploration, and, for the judge to question, for the purposes of clarification, but general statements as to statistics and the types of appeal before a judge, and personal observations of the nature highlighted in this appeal, even if they do not indicate obvious bias, raise the notion that the judge has taken into account irrelevant matters rather than concentrating on the specific and individual circumstances of the case. The opportunistic and previous claims of other appellants are not relevant. It is this individual appellant's evidence which is relevant.

17. At this point it is helpful to identify what are considered to be errors of law as set out by the Court of appeal in **R (Iran) v The Secretary of State** [2005] EWCA Civ 982 at paragraph 9.

'...It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

- (i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");*
- (ii) Failing to give reasons or any adequate reasons for findings on material matters;*
- (iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;*
- (iv) Giving weight to immaterial matters;**
- (v) Making a material misdirection of law on any material matter;*
- (vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;*
- (vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made'.*

18. I note Mr S acceptance that he did not object at the time of the hearing and the notes refer only at the outset of the hearing to 'matters discussed'; there is no reference to the comment cited in the witness statement. Rather than a finding of bias, I conclude that the judge has erred in giving weight to immaterial matters, which he has referred to at the outset of his deliberations and in his own decision. Although the judge has gone on to make relevant criticisms of the appellant's evidence those findings might appear to have been influenced or tainted by irrelevant matters. As such I find a procedural irregularity capable of making a material difference to the outcome or the fairness of the proceedings, an error which is identified as an error of law in **R (Iran)**. Owing to my findings in this regard it is unnecessary to consider the further two alleged errors of law.

19. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2)

(b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

20. The matter should be returned to the First Tier Tribunal for a hearing de novo.

Signed Helen Rimington

Date 7th August 2017

Upper Tribunal Judge Rimington