



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/01266/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Newport

Decision & Reasons

On 21 November 2017

Promulgated

On 4 December 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KDML

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Caseley instructed by Migrant Legal Project (Cardiff)

For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Grenada who was born on 7 July 1987. He arrived in the United Kingdom on 22 January 2015 and was granted leave

to enter as a visitor for a period of six months. He overstayed. On 18 January 2016, he was arrested by the police in relation to drugs offences.

3. On 19 January 2016, the appellant was served with notice of his liability to be removed as an overstayer.
4. On 22 February 2016, the appellant made a human rights application relying on Art 8 of the ECHR. This was, however, refused on 21 July 2016 and certified as clearly unfounded.
5. On 11 August 2016, the appellant claimed asylum. The basis of his claim was, and is, that he is bisexual and would be at risk on return to Grenada as a result.
6. On 20 January 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. In a decision sent on 16 May 2017, Judge Page dismissed the appellant's appeal on asylum grounds and under Art 3 of the ECHR. The judge did not accept that the appellant was bisexual and consequently would be at risk on return to Grenada. However, the judge allowed the appeal under Art 8 in order that the appellant be granted a period of discretionary leave in order for him to complete Family Court proceedings in relation to a child in the UK of whom he was the father.

The Appeal to the Upper Tribunal

8. The appellant appealed to the Upper Tribunal against the judge's decision to dismiss his appeal on asylum grounds and under Art 3 of the ECHR.
9. Permission to appeal was granted by the First-tier Tribunal (Judge Saffer) on 12 September 2017.
10. On 28 September 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision to dismiss the appellant's appeal on asylum grounds and under Art 3 of the ECHR.
11. The Secretary of State has not sought to challenge Judge Page's decision to allow the appellant's appeal under Art 8.

The Submissions

12. Ms Caseley, who represented the appellant, relied upon the three grounds of appeal upon which permission was granted.
13. First, she submitted that the judge had failed to explain why he had disbelieved the appellant's account concerning his sexuality and conduct in Grenada when, at para 40, the judge had said that he had reached the same conclusions as the respondent.

14. Secondly, Ms Caseley submitted that the judge had reached contradictory findings in relation to whether the appellant suffered from any mental impairment and its impact upon the cogency of his evidence. She submitted that the judge had accepted the expert's view (Dr Battersby) that the appellant had a "significant cognitive impairment" which was "highly likely to reduce the cogency of his evidence" and that "dates are highly likely to be inaccurate" and it is unlikely that he would be able to "withstand robust cross-examination". Yet, Ms Caseley submitted, the judge stated at para 40 that there was "no evidence of any impairment".
15. Thirdly, Ms Caseley submitted that the judge had been wrong to ask questions, or allow them to be asked, of the appellant's current partner about their sexual relationship, in particular how many times she and the appellant had had sex together. Ms Caseley submitted that this ran counter to the approach set out in the CJEU decision in A, B & C v Staatssecretaris van Veiligheid en Justitie (Cases C-148/13, C-149/13 and C-150/13) [2015] Imm AR 404 at [64] that it was a breach of an individual's "right to respect for private and family life" to ask questions "concerning details of the sexual practices" of a claimant.
16. On behalf of the respondent, Mr Richards first submitted that the judge had not simply adopted the reasons given by the respondent for disbelieving the appellant. He submitted that the judge had considered the evidence, including the appellant's answers in cross-examination, and had made an adverse credibility finding.
17. Secondly, Mr Richards submitted that the judge had accepted Dr Battersby's evidence that the appellant had "significant cognitive impairment" and had, at para 22, agreed that the appellant should be treated as a vulnerable witness. However, he had found - not inconsistently with that - at both paras 22 and 40 that there was "no evidence of any impairment" when the appellant gave evidence at the hearing. This was not, Mr Richards submitted, a case where the appellant's evidence was criticised due to him making mistakes about dates and it was not a case where he had been subjected to particularly robust cross-examination. The judge had done no more than was required, namely keeping in mind Dr Battersby's evidence, when assessing the appellant.
18. Finally, Mr Richard submitted that in relation to the questions asked of the appellant's witness, this did not fall within the prohibition on asking "details" of the appellant's sexual practices. The witness had been asked no more than how often she had had sex with the appellant. That was a necessary question given that an important part of the appellant's case, claiming to be bisexual, was that he only had sex with women in order to have children. The questions went no further, Mr Richards submitted, than were necessary.

Discussion

19. I will deal with each of the grounds raised in the order grounds 2, 3 and 1 respectively.
20. As regards ground 2, the judge said this about discrepancies in the appellant's account which had been identified by the respondent at para 40 of his determination:

"40. I find myself reaching the same conclusions that the respondent reached about the appellant's asylum story as to what happened in Grenada. The discrepancies that the appellant was taken to by Ms Bowden were all explained by the appellant as having been caused by confusion. I accept that he may have learning difficulties but it is only where there are discrepancies that the appellant claims to have been confused by questions in interview. He blamed learning difficulties for any discrepancy damaging his case. I found him to be articulate and alert throughout the hearing and there was no evidence of any impairment, though I accept Dr Battersby's assessment in her report".

21. It is clear to me that the judge did not simply adopt the respondent's reasoning without taking into account the evidence given by the appellant at the hearing why those discrepancies should not affect his evidence. Ms Caseley accepted that this ground was, in effect, based upon an argument that the judge had simply illegitimately adopted the respondent's reasons without considering that evidence. That, it is plain from reading para 40 and the entirety of the determination, the judge did not do. He set out at length the appellant's evidence given largely in cross-examination about his relationships in Grenada at paras 25-28 as follows:

"25. He said his first same-sex relationship was with [M] in Grenada. They became friends and then had a relationship. He described his relationship as on and off and said they were together for almost two years. In answer to questions from Miss Bowden the appellant said that he realised he was bisexual when he was 19 years old. It was 19 when he began having sexual interaction with men. She asked him why he had said in his asylum interview that he had been 16 years old, he replied that he had not understood the question he had been asked in interview. Miss Bowden also asked him why he had said in his evidence that he had been in a relationship with [M] for two years whereas in his asylum interview he had said he had been in a relationship with [M] for two months. He said he did not remember saying in his asylum interview that it had been two months. He could also not name any men in Grenada that he had been in a relationship with because he could not remember names. Miss Bowden suggested to the appellant the reason he could not remember was because he had invented his asylum story. He replied 'I wouldn't make stuff up like that'.

26. In his evidence, he said that he had sexual encounters with men in Grenada occasionally. The appellant had said in answer to question 60 of his asylum interview that between 2005 and 2013 when he left Grenada he had often had bisexual encounters at St George's Beach. He was pushed to explain what he meant by often, every day, every week, or every month, and he answered 'every day'. As a result of this answer Miss Bowden asked the appellant why he would risk having sex on a beach in a country where he would be at risk. He said that he could have friends that he met on the beach but had not had sex on the beach. Miss Bowden reminded him of his answer to question 60 where he had replied that he had sex on St George's Beach every day. He

replied that he had given that answer to question 60 because he was confused and had not understood.

27. Miss Bowden asked the appellant about his answer to question 72 of the asylum interview where he had said that he knew a lot of people in Grenada who were bisexual and gay and he had known what their sexuality was by talking to them and by them talking to him and 'we exchanged stuff, that's how I get to know'. She asked him why he would risk telling people that he was bisexual in a country where he would be taking a risk of persecution. He replied: 'I was confused. I felt I had to say certain things'.
28. Miss Bowden asked the appellant about his relationships with women in Grenada, and how he had kept his bisexuality from them. He replied that he had had no relationships with women in Grenada. He went on to explain in answer to questions from Miss Bowden that when he came to the United Kingdom he was not really looking for a woman. He had met [A] online but he wanted to get away from Grenada because of his 'bisexual situation there'. Miss Bowden asked the appellant about a letter that the Home Office had received from his wife [A] dated 28 August 2016 in which she has complained that he had cheated on her with two women, one called [P] and a second woman called [C]. He replied that he did not know anything about those people that his wife [A] had said untrue things about his relationship with them. He said he did not have sex with [P] or [C]. He confirmed in answer to questions from Miss Bowden that he had only gone with a woman for the purpose of procreation and nothing more. He said:

'Yes it was just kids that caused me to go with women. You can't get that from a man'.

Miss Bowden put to the appellant that the only evidence of relationships the appellant had was with the women he has had children with, or expecting a child with. He replied:

'I'm not into woman, I'm into man. I'm not interested in woman at all. If I was I would be with my wife'.

22. With reference to that evidence, the judge in para 40 did not accept that the discrepancies were due to the appellant's learning difficulties and any cognitive impairment.
23. Consequently, I reject ground 2. The judge did not simply 'rubber-stamp' the respondent's reasons. Rather, he considered the discrepancies in the context of the appellant's evidence and explanation of the discrepancies. That then leads to ground 3 where, at least in part, the ground seeks to challenge the judge's approach to the evidence and, in particular, that of Dr Battersby.
24. The judge set out in some detail Dr Battersby's evidence at paras 19-22 in the following terms:

"19. Dr Battersby interviewed the appellant at [] in Plymouth on 11 March 2017. He was brought to that interview by his partner [S]. Dr Battersby records that it was a difficult interview and the appellant was irritable several times. However, she concluded that the appellant was capable of conducting legal proceedings and had the capacity. At page 11 of her

report Dr Battersby has responded to the specific instruction that she received from the appellant's representatives which I set out here:

'The Home Office decision maker has made a number of adverse credibility points in relation to the client's claim to be bisexual. Please address with the client his full psycho-sexual history with detailed assessment of his psycho-sexual functioning e.g. sexual development etc'.

At page 22 of her report she has repeated this instruction and referred the reader to the heading 'Events leading to the current situation' set out at page 11-12 of her report. To take matters shortly Dr Battersby was unable to reach any conclusions given the appellant's response to her questions about his sexuality and gave up when trying to comply with this specific instruction from the appellant's representatives.

20. The appellant had told Dr Battersby that he had always been attracted to men and was bisexual, adding 'I'd never be gay'. He had gone on to explain to Dr Battersby that his first relationship was with [M] and that they were together on or off for two years until the time [M] left. He said that between the age of 21 and 23 he had casual male partners 'just for sex'. Dr Battersby asked him when he first had sex with a woman and he told Dr Battersby that he could not remember. She asked him whether he had been drunk or on drugs and he became quite irritable with her and said that he had a problem with his memory. He told Dr Battersby that given his oldest child was 9 years old he must have been about 20 or 21 when he fathered this child. He told Dr Battersby that the woman was a friend that they had had sex and she got pregnant. He became irritable with Dr Battersby and said, rather loudly, 'you got sex friends it's your friend but you'll have sex, don't you'. He said that his other child in Grenada was from sex with a friend and not a relationship and that he has not had any other significant relationships in Grenada. The next part of her report concluded her investigation into the appellant's claimed bisexuality and I set that out here:

'He told me 'I always wanted kids, a man can't give me kids, the only thing that attracts me to women is kids'. He told me that he would always take care of his kids. I asked whether he ever had sex with a woman only for the experience and he told me that he only had sex with women for kids. I asked about use of contraception and he said that he always protects himself when having sex with men by using condoms but never uses condoms with women. I asked him whether he was gay rather than bisexual as he describes only having sex with women for producing kids. He became quite angry with me and reiterated that he was bisexual. He was angry enough that I did not explore this further'.

21. It is apparent from Dr Battersby's report given the appellant's responses which I have set out above that Dr Battersby was unable to opine on the plausibility of the appellant's claim to be bisexual as instructed. She referred those instructing her to the above paragraph as her response to their request.
22. Dr Battersby did, however, diagnose the appellant with having 'significant cognitive impairment' and that this was likely to reduce

the cogency of his evidence that dates were highly likely to be inaccurate and that he was more suggestible than most appellants and unlikely to withstand robust cross-examination. Because of this I acceded to the application made on the appellant's behalf by Counsel for the appellant Ms Caseley to treat the appellant as vulnerable witness, to which no objection was made on behalf of the respondent. However, throughout the hearing the appellant gave no indication that he was suffering from any impairment. It was plain that he understood the questions and points being made; particularly during submissions made on behalf of the respondent when he expressed disagreement with the points that were made against him when it was submitted that his claim to be bisexual was fabricated".

25. In para 22, it is clear that the judge accepted Dr Battersby's evidence that the appellant suffered from "significant cognitive impairment" and, as she said in her report, this was:

"highly likely to reduce the cogency of his evidence and e.g. dates are highly likely to be inaccurate. He is also likely to be more suggestible than most appellants and unlikely to withstand robust cross-examination which in my opinion would reduce the cogency of his evidence".

26. Again, at para 40, the judge specifically stated that he accepted Dr Battersby's assessment. However, and I reject Ms Caseley's submission on this issue, it is clear that the judge does not contradict that evidence when he stated both in paras 22 and 40 that there was "no indication that he was suffering from any impairment" and "no evidence of any impairment". There, the judge was clearly making an assessment of the appellant when he had given evidence at the hearing. I do not see any reason why the judge should not have done so. It is plain that the judge was well aware of the potential issues raised by the appellant's mental health.
27. It was undoubtedly incumbent upon the judge to approach the appellant's evidence with some caution given Dr Battersby's evidence which he accepted. He treated the appellant as a "vulnerable witness" (see para 22). The need for caution in the assessment of evidence in circumstances such as in this appeal were emphasised by the Court of Appeal in AM (Afghanistan) v SSHD and Lord Chancellor [2017] EWCA Civ 1123. Unlike in that case (at paras [15] and [16]), I am satisfied that the judge took full account of the expert evidence concerning the appellant's vulnerability and cognitive impairment. The judge did not ignore Dr Battersby's opinion and was entitled to take into account that the appellant's claimed "confusion" only arose when dealing with discrepancies in his evidence. There is nothing in the determination to suggest that the appellant was subject to the "robust cross-examination" which Dr Battersby identified as potentially problematic in assessing the cogency of his evidence. In my judgment, Judge Page was entitled for the reasons he gives to doubt the veracity of the appellant's account and therefore of his claim.
28. Turning now to ground 1, Ms Caseley relied upon A, B & C at [64] where the CJEU stated:

“... while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof”.

29. In the course of her submissions, I raised with Ms Caseley whether the decision of the CJEU in A, B & C prohibited the asking of *any* questions whether by the respondent in cross-examination or by the judge in relation to an individual’s sexual life. I did not understand Ms Caseley to contend that to be the case; although she was unable to offer any ‘bright’ line or indeed ‘fuzzy’ line to de-mark the permitted from the not permitted.
30. The CJEU’s decision offers no guidance on what is meant by “details of the sexual practices” of an individual. I do not understand the CJEU to suggest that any question relating to an individual’s sexual practices is prohibited by Art 7 of the Charter (or by analogy Art 8 of the ECHR). Each case must necessarily be fact-sensitive. Art 7 of the Charter and Art 8 of the ECHR do not create absolute rights. Both Art 7 and Art 8 are subject to interference on grounds of proportionality. That, in itself, may suggest that not every question concerning a person’s sexual life would infringe the Charter or ECHR. Questions which seek to elicit explicit, intimate details of a sexual relationship may well fall within the prohibition. The intrusion into the individual’s private life may well be too great to be justified and survive scrutiny on a human rights basis.
31. In this appeal, the questions directed to the appellant’s current partner went no further than enquiring whether she and the appellant had sex together, how often they did so, and whether her understanding was that he was only having sex with her to have a child. In my judgment, whilst those questions do involve enquiry into the private life of both the witness and the appellant, the questions do not seek or require to be answered by disclosure of explicit or, it could be said, lurid detail which would unnecessarily interfere with or offend those individuals’ human dignity. Taken with which, of course, the questions were directly relevant to the appellant’s claim that he was bisexual, with which he self-identified as a person who did not have sex with women other than for the purposes of procreation. In my judgment, Judge Page did not err in law in permitting these questions to be asked, or himself asking them, of the appellant or his current partner.
32. For the above reasons, therefore, I reject grounds 1, 2 and 3.
33. The judge did not err in law in reaching his adverse credibility findings and in finding that the appellant had not established that he was bisexual as he claimed and consequently that he was at risk on return to Grenada.

Decision

34. The decision of the First-tier Tribunal to dismiss the appellant’s appeal did not involve the making of an error of law. That decision stands.

35. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", with a horizontal line underneath.

A Grubb
Judge of the Upper Tribunal
1, December 2017