



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/01828/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Royal Courts of Justice**

**Decision & Reasons  
Promulgated  
On 7<sup>th</sup> July 21017**

**On 3<sup>rd</sup> July 2017**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**Z  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss, Counsel Fitzsimons instructed on behalf of the Appellant

For the Respondent: Mr D. Clarke, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Pakistan.
2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 25<sup>th</sup> April 2017 dismissed his claim for protection based on his membership of a particular social group, on the grounds of his sexuality as a gay man.

3. The Appellant's lengthy immigration history is set out within the determination at paragraph 1 and in the decision letter issued by the Secretary of State at paragraph 13.
4. The basis of the Appellant's protection claim is recorded in the decision letter and the decision of the First-tier Tribunal at paragraphs [18] to [23]. His claim for protection related to fear on return to Pakistan in the light of his sexuality as a gay man. The decision letter made reference to a number of matters which was said to undermine his credibility in relation to his factual account of his sexuality and also his immigration history. In particular it was noted that an application was submitted on the basis of a relationship with a woman which was further pursued by way of judicial review. The decision-maker considered letters that have been provided by the Appellant to support his claim but it was considered that those documents were self-serving and had little weight attached to them. In addition consideration was given to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and that it was only after his arrest in December 2016 that he made a claim for asylum. It was concluded that the Appellant had failed to provide any reasonable explanation of his failure to claim asylum before his arrest. Thus his claim was rejected.
5. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 4<sup>th</sup> April 2017. There had been a preliminary issue raised before the judge which related to an application for an adjournment. The basis of the application was that judicial review proceedings had been issued in the High Court challenging the Appellant's detention and the retention of his claim in the DAC procedure. The papers also refer to a previous application for an adjournment relating to the non-availability of a material witness. The judge refused that application at paragraph 9 on the basis that there had been no High Court order staying the proceedings and therefore it was "in the interests of justice and fairness to proceed". The Appellant heard evidence from the Appellant and his partner and submissions from each advocate.
6. The judge set out his findings at paragraphs [44] to [54]. In those findings he rejected the core of the Appellant's claim that he was a gay man. He found the Appellant to be "vague and evasive", he disbelieved his account as to why he had entered into a relationship with a woman [46]-[47] and did not accept that the Appellant and his partner had given consistent evidence concerning their relationship [48 - 50] and that if he had had "homosexual feelings throughout his life, he would have had more relationships than the one and only with Mr B". Consequently he dismissed his appeal.
7. The Appellant sought permission to appeal that decision Immigration Judge Gibb granted permission to appeal on the 17<sup>th</sup> May 2017 in the following terms:

"The grounds, which were in time, complain that the judge erred in: (1) refusing to adjourn the hearing (is not suitable for the DAC procedure, and

for a witness to attend): and (“) not taking account of the background evidence and context in assessing credibility through un evidenced assumptions as to likely behaviour.

The grounds are arguable. The reasoning at [9] is brief, and arguably does not address the central issue of fairness. Second round is also arguable, with reference to the reasoning at [48-50].

There is another area of concern, namely the determination has numerous spelling, typographical and grammatical errors. These suggest that a draft determination may have been promulgated in error. At [54] there is a positive statement as to credibility in the third sentence of that paragraph that is at odds with the rest of the decision. With the seriousness of the subject matter and the need for anxious scrutiny it is problematic when a determination has errors that are so numerous as to suggest that the promulgated decision has not been proofread and finalised.”

8. At the hearing before this Tribunal, Miss Fitzsimmons appeared on behalf of the Appellant, who had not been produced from detention. She made reference to information that she had been given by Mr Clarke, Senior presenting officer, that there was a note that the Appellant had applied for voluntary return. Mr Clarke could give no further details and whilst time was given for Ms Fitzsimons to take instructions, she was not able to furnish the court with any further information despite being given time to ascertain the circumstances from both the Appellant and from her instructing solicitors. In those circumstances there being no evidence in this respect, I continued to hear the submissions of the parties. An additional issue raised by Ms Fitzsimons was the application made for an adjournment the previous day which had been refused by Upper Tribunal Jordan. This indicated that permission had been granted to apply for judicial review. I informed the parties that in reaching a view on that application, it was necessary for me to hear the submissions of the parties relating to whether or not the determination of the First-tier Tribunal demonstrated the making of an error on a point of law.
9. Therefore I heard the submissions from the parties which are set out in my record of proceedings to which I have had regard when reaching my overall decision.
10. Miss Fitzsimons relied upon the written grounds which raised two specific grounds; ground 1, dealing procedural unfairness caused by the refusal to grant an adjournment and the second ground relating to the credibility findings made by the judge and his expectations of “homosexual behaviour.” In respect of ground one, she took the Tribunal through the history and the applications made for an adjournment. In this respect she made reference to the relevance of the evidence of the witness who was unable to attend in the light of the adverse credibility findings subsequently made at paragraphs 45 to 47 by the judge. The judge reached an adverse conclusion concerning his prior relationship with a woman, however, the witness had given evidence to put this relationship in context. As to ground 2, she made specific reference to paragraph 50 of

the determination at which the judge made a finding that if the Appellant in fact was gay he would have had more than one relationship. She submitted that this failed to take account of the evidential context of the Appellant's past history and the impact upon him and in addition demonstrated an assumption made by the judge that a person who was gay would have more than one relationship. She also relied on Judge Gibbs' observations and the matters raised in the grant of permission. Thus overall she submitted the findings of fact were unsafe and in the light of the procedural irregularity should be set aside.

11. Mr Clarke on behalf of the Secretary of State relied upon the rule 24 response dated 5 June 2017. He submitted that the judge directed himself appropriately and in relation to ground one, there was nothing to demonstrate that an application was made for an adjournment other than on the basis that the Appellant had an outstanding judicial review claim. He submitted there was no injunction or interim relief granted and therefore it was a matter for the judge to decide. As to ground 2, he accepted that at paragraph 50 the judge had given a subjective view of homosexual behaviour but that the judge had given other reasons for reaching the conclusion that the Appellant had not demonstrated his sexual orientation. Mr Clarke made reference to the judge's referral to his evidence as being "vague and evasive" and that he had had a previous relationship with a woman and the circumstances of that. The judge also made reference to inconsistencies as to the evidence given by the Appellant and his partner. As to the issues raised in the grant permission Mr Clarke submitted that they were simply a "slip" made by the judge.

Decision on error of law:

12. Having had the opportunity to hear the submissions of the parties and consider them in the light of the papers before me and the determination of the First-tier Tribunal, I do not consider it necessary to adjourn the proceedings any further. It seems to me that whatever the outcome of the outstanding proceedings, the position as to whether the judge erred in law or not will still remain an issue and therefore if the judge did err in law it is necessary to ascertain that as soon as possible. I have therefore gone on to consider the grounds advanced on behalf of the Appellant and the submissions made by each of the parties.
13. The first error relates to an issue of procedural unfairness based on the refusal of the judge to grant an adjournment. The grounds referred to two elements of that application. Firstly, on 4 April 2017 on the day of the hearing, the Appellant's representatives had issued judicial review proceedings challenging his detention and the retention of the claim in the DAC and seeking interim relief. However it is right to observe from the file before me that on the 29 March 2017, a letter before action was sent to the Secretary of State setting out the nature of the claim and in particular, raising the issue of the failure to give the Appellant the opportunity to gather evidence relating to his claim. A copy of that letter before action is on the UT file. On 31st March 2017 an application was made for an adjournment on this basis but was refused noting that such an application

could be presented on the day of the hearing (as it subsequently was). The grounds set out the material relevant to consideration of whether the claim was one that was suitable for the DAC process.

14. The judge set out his reasons for refusing that application at paragraph 9. He stated that there had been no High Court order staying the proceedings before the Tribunal therefore it was “in the interests of justice and fairness” to proceed with the hearing. No further reasons were given or any explanation as to why the decision was either “in the interests of justice” or was otherwise “fair”. Whilst it was right that the High Court had refused interim relief on the papers, Miss Fitzsimons submitted that it was intended that the matter be given consideration by the First-tier Tribunal in the exercise of its discretion by reference to the issues.
15. In my judgement, the judge’s consideration of the issue at paragraph 9 did not engage with the nature of the application, the reasons for it nor did the judge apply the relevant procedural rules or direct himself to the law that he should apply. As set out in the decision of Nwaigwe (adjournment: fairness) [2014] UKUT 148 (IAC) the issue is one of fairness and the right of an Appellant to a fair hearing. Had consideration of this issue been undertaken it would have resulted in an investigation into the history and that on the same day the Appellant’s representatives had requested an adjournment on account of the judicial review proceedings, they had also made a request based on a witness who could not attend the hearing. I take into account Mr Clarke’s submission that it does not appear that this part of the application had been made specifically before the judge, despite the grounds referring to it. However, in my judgement full consideration of the circumstances surrounding the adjournment request would have resulted in this being raised. The Appellant’s solicitors had raised the issue of the ability of those detained in the DAC and particularly LGBT claimants to produce evidence relevant to the circumstances of the claim. Therefore the non-availability of a witness who would be able to provide such evidence was a relevant consideration to the overall issue of fairness. A previous adjournment had been granted for the attendance of a witness. The solicitors had provided evidence in support of that application. As the grounds set out, there was relevance to that evidence as it went to the issue of credibility and in particular the Appellant’s circumstances at the time of the relationship breakdown with a woman and his “coming out” as a gay man. Both were points the judge later went on to find as particularly adverse to the Appellant (see paragraphs 46 – 47). Therefore it is conceivable that at the adjournment been considered in the light of the full material and granted, material evidence would have been before the judge bearing on an issue that he had to decide.
16. I therefore find an error of law on the basis of procedural irregularity which is sufficient by itself to result in the decision being set aside and in those circumstances it is not necessary for me to consider further the other remaining grounds advanced on behalf of the Appellant. However in this context I observe that the judge did make findings which related to discrepant evidence between that of the Appellant and his partner (see

paragraphs 48 and 49) which, as Mr Clarke submitted, are not challenged in the grounds and were findings that were reasonably open to the judge to make on the evidence. However, as Miss Fitzsimons submits, there were errors when reaching the overall finding as to the Appellant's sexuality. The judge reached a finding at [50] that "if the Appellant had homosexual feelings throughout all of his life then he would have had more relationships than the one and only with Mr B". However such finding failed to take into account the evidence recorded by the judge paragraphs 19 to 20 concerning the context and circumstances which led to that single relationship. Furthermore, such a finding appears to presuppose that a homosexual person will be expected to have more than one relationship. There is no such test for sexual orientation being measured by the nature and frequency of partners and that is an error of approach which I accept may have undermined his overall finding.

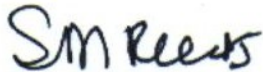
17. The grant of permission also identified a further issue that the determination is inconsistent concerning the nature of the relationship. At [54] the judge stated "I do accept that the Appellant is in a genuine homosexual relationship with Mr B who came to give evidence." Mr Clarke submits that this was simply a slip. That may be so when read in the light of the paragraph but not necessarily so. There were a number of spellings and typographical errors as highlighted in the grant of permission which suggests that the determination may not have been properly proofread or indeed finalised. However my decision does not rest on that point and having considered the grounds overall and having reached the conclusion that the grounds relating to procedural irregularity or fairness are made out and in addition to the points set out earlier, I am satisfied that the determination should be set aside.
18. As to the remaking of the decision, it is not possible for the Upper Tribunal to remake the decision as the Appellant has not been produced nor have his witnesses been asked to attend and also in the light of the ongoing litigation. It is also necessary to consider the nature of the error of law found. As it refers to procedural unfairness and also the findings subsequently reached, it will be necessary for further findings of fact to be made on all the evidence. Consequently I am satisfied that the correct course would be for the appeal to be remitted to the First-tier Tribunal.
19. In the light of those submissions, I am satisfied that this is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal. The Appellant's solicitors will be required to inform the First-tier Tribunal of the time scale of the litigation and any submissions as to any further listing or adjournment as may be necessary.

**Decision:**

The determination of the First-tier Tribunal involved the making of an error on a point of law; it is set aside and remitted to the FTT for a hearing.

**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. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed  
Upper Tribunal Judge Reeds

Date: 6/7/2017