



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/02311/2017

**THE IMMIGRATION ACTS**

Heard at Manchester IAC  
On 27<sup>th</sup> July 2017

Decision & Reasons Promulgated  
On 31<sup>st</sup> July 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

M S

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Gunawal of Duncan Lewis Solicitors  
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant/parties in this determination identified as MS. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. First-tier Tribunal Judge Rowlands dismissed the appellant's appeal on Refugee Convention grounds against the decision refusing to recognise him as a refugee, refusing him humanitarian protection or human rights protection.
2. The appellant sought and was granted permission to appeal the Refugee Convention decision in the following terms

....The grounds amounted to no more than a disagreement with the findings of the judge and an attempt to reargue the appeal. However, a careful consideration of the judge's decision revealed arguable errors of law but for which the outcome of the appeal might have been different. The judge made an arguable error of law amounting to a misdirection as to the applicable standard of proof in stating at paragraph 32 of the decision, "It is as difficult for an appellant to prove that he is gay..." the judge arguably applied an elevated standard of proof. The judge arguably took into account an irrelevant consideration when assessing the credibility of the appellant and his brother by appearing to accord weight to their apparent evasiveness the judge stating at paragraph 32 of the decision, "Both of them appeared evasive when giving their evidence...". The judge arguably should not have taken into account their demeanour as it appeared to the judge, when assessing their credibility. The judge made an arguable error of law amounting to a failure to take into consideration a relevant factor when assessing psychiatric evidence adduced on behalf of the appellant. When assessing credibility it was for the judge to assess the evidence in the round. However, at paragraph 41 of the decision the judge stated, "As to psychiatric assessment it all depends on the credibility of the appellant." The judge arguably arrived at a finding that the appellant had not been a credible witness before considering the psychiatric evidence. Arguably the judge should have considered the evidence as a composite whole and not sequentially as the judge appeared to do....

3. Ms Gunawal submitted a skeleton argument which did not elaborate on the grounds of appeal upon which permission had been granted. The skeleton asserted that there had been a failure by the First-tier Tribunal judge to grant an adjournment to enable a detailed medico-psychiatric report to be obtained. Ms Gunawal acknowledged that the grounds seeking permission, which had been drafted by the advocate who appeared in the First-tier Tribunal, had not referred to this alleged failure. She also acknowledged that there was no reference in the judge's decision to a request for an adjournment having been made and refused. She was unable to confirm whether an adjournment request had been made at the First-tier Tribunal hearing because the advocate who had appeared in the First-tier Tribunal had been away on holiday "in Africa" for the last 6 weeks; she repeatedly referred to previous applications made by post and considered on the papers and refused. Initially she did not wish to make an application to amend the grounds of appeal but continued to rely on what she referred to as "discussions" that had taken place at the hearing and to previous applications for an adjournment that had been refused on paper. Eventually she formally sought permission to amend. In the absence of a note or witness statement from the advocate who appeared before the First-tier Tribunal, Ms Gunawal's inability to confirm that an application for an adjournment had been made to the First-tier Tribunal Judge and that there was no reference in the decision that such an application had been made, I refused her permission to amend her grounds. I would comment that in the absence of an application for an adjournment, it cannot in this case, be an error of law on the part of the First-tier Tribunal judge not to grant an adjournment that has not been requested.

4. Ms Gunawal's submissions elaborated on the grounds upon which permission had been granted.

### **Ground 1**

5. Ms Gunawal submitted that the judge had failed to apply the correct standard of proof. In support of this submission she relied upon *JB (Jamaica)* [2013] EWCA Civ 666 (the incorrect citation was given in the grounds seeking permission) which states, as relied upon by her,

29. A failure properly to comply with a policy relating directly to the exercise of a power to detain is sufficient of itself to render the detention unlawful: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 2012 1 A.C. 245 and *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299. The matter does not end there, however, because there is also the question whether this was a claim which, in the light of all the information that should have been available, could ever have been regarded as one in respect of which a fair and sustainable decision could be made within about two weeks. Given the nature of the appellant's claim, I find it difficult to see how it could. Homosexuality is a characteristic that cannot be reliably established without evidence from sources external to the claimant himself. On the face of it, therefore, the appellant did need additional evidence to support his claim and since some of that evidence was likely to be available only in Jamaica or elsewhere abroad, it was likely that he would need additional time in order to obtain it. A failure to allow him that time was likely to lead (as in the event it did) to a decision that was neither fair nor sustainable.

6. It is not clear either from her submissions or from the grounds of appeal how the judge erred in law. It has not been asserted that the judge failed to take account of relevant material or that other material or evidence was awaited and relevant to the judge's decision on whether the appellant is gay. Although Ms Gunawal said the appellant needed external evidence she did not identify what that evidence would be or how that affected the standard of proof applied by the judge.

### **Ground 2**

7. It was submitted that the judge failed to accord adequate weight to the father's and brother's evidence and had failed to give proper reasons as to why that evidence was inadmissible – paragraphs 35 and 36 of the First-tier Tribunal decision.
8. It was not apparent to me that the judge had concluded the evidence was inadmissible. He concluded their evidence could not be relied upon. The judge considered the written evidence from the brother and the father, referred to the almost exact same wording used despite them being produced some seven years apart for which no explanation was provided, referred to the lack of explanation how, if the father had disowned the appellant he would draft and provide an affidavit and continue to fund his studies. The judge considered the oral evidence of the brother which referred to matters which were not in his witness statement. He considered the oral evidence from the brother that the appellant had been seen kissing in a public park in the context of the appellant's own evidence that he wouldn't go to Manchester's gay quarter. The judge states

that he found the brother was 'evasive' when giving evidence. It was submitted this was an inadmissible taking into account of demeanour. The judge acknowledged that evasiveness could be as a result of nervousness but oral evidence being given evasively is not a matter of demeanour. It is an assessment by the judge of the willingness of an appellant to answer questions put during a court hearing.

9. Ms Gunawal submitted the *actual* evidence should have been taken into account and that it was an error of law for the judge to assume the brother would lie in court. It is not clear what she meant by this. She did not identify evidence that had not been considered but rather seemed to be submitting that the mere fact that evidence had been produced meant that it should be accepted in its totality by the judge. The judge is required to assess the evidence before him and reach conclusions on its reliability. There is nothing in this decision to indicate that the judge had the preconceived view that the brother would lie to support the appellant. With the greatest of respect to Ms Gunawal, the judge assessed the evidence given by the father and the brother in the context of the evidence given by the appellant. The judge considered the contradictions in the evidence and reached a conclusion that the evidence of the brother and the father could not be relied upon as supporting the appellant's claim that he was gay. Such a conclusion was a conclusion plainly open to him on the evidence before him.

### **Ground 3**

10. Ms Gunawal submitted that the judge failed to assess the appellant's evidence properly and in particular, that if he returned to Pakistan, where everyone knew of his sexuality, he would be forced to work as a sex worker or dancer. Again, with the greatest respect to Ms Gunawala, the judge did consider this aspect of the appellant's claim. The judge recorded the appellant's evidence to this effect in paragraph 4, 5, 6 and 8. He refers again to that evidence in paragraph 37 and refers to it being inconsistent with the 'objective' evidence. The fact that an appellant makes an assertion does not require a judge to accept the assertion.

### **Arguable errors of law raised in the grant of permission**

11. Although not pleaded, the First-tier Tribunal judge who granted permission identified what he said were arguable errors of law. In particular, he stated that the reference by the judge in paragraph 32 to

"it is as difficult for an appellant to prove that he is gay"

arguably indicated the judge had applied the incorrect standard of proof. The full sentence in the judge's decision reads

"It is as difficult for an appellant to prove that he is gay as it is for the respondent to prove that he is not"

This is not an issue of burden or standard of proof but a statement of fact. *JB*, relied upon by the appellant, makes plain the difficulties of proving such an innate characteristic. The judge is merely reflecting that.

12. The grant of permission also states it is arguable the judge failed to consider the evidence in the round when reaching his conclusions. The grant draws attention to paragraph 41 of the decision which states

“As to the psychiatric evidence it all depends on the credibility of the appellant. The writer talks of there being no evidence of him faking his symptoms but she has given no indication as to whether she has considered his previous history of making false claims. Clearly if she had been aware of this she might well have taken a different view as to the credibility of his claimed symptoms. She acknowledges his previous inconsistencies but not the making of the false claims. I am not satisfied that he has told the truth to her anymore than he has told me. I am not satisfied he is telling the truth about his sexuality, there has [sic] been no attacks upon him and he can safely return to Pakistan.”

13. The report, prepared following a 2 ½ hour face-to-face interview with an interpreter whilst the appellant was in detention, from Dr Reiss of Medical Justice sets out the appellant’s claim of some homosexual encounters and to having been kidnapped some 10 years previously. She states that

“he has symptoms and signs of depression as detailed in ICD-10 diagnostic guidelines.....symptoms and signs of post-traumatic stress disorder”.

She concludes he meets the diagnostic criteria for severe depression and that he should receive high intensity psychological intervention. She also concludes that his “symptoms and demeanour” are consistent with a likely diagnosis of PTSD. She concludes

“There were no indications during my assessment that [the appellant] was exaggerating or faking his history or symptoms. He was consistent in his distressed demeanour throughout the lengthy consultation and was tearful on a number of occasions when describing some particularly distressing aspects. He was hesitant to describe details of his first sexual encounter, but as he described it, it may have been non-consensual and thus traumatic. Difficulty describing sexual trauma is well recognised. He was disorganised in giving details of his history and from the documents I have read has been previously inconsistent in aspects of his story, which is clinically compatible with a history of trauma. If he was faking, one would expect a more organised and sequential description.....his ongoing detention appears to be contributing to his worsening mental state...”

14. The respondent, in a Rule 24 response which was only available to me and to Ms Gunawala on the day of the hearing submitted that the First-tier Tribunal judge had considered the psychiatric report and it was open to the judge to find that the appellant was not honest, in his assessment. (Although Ms Gunawala did not receive the copy of the Rule 24 until after she had completed her submissions, having had time to read it she confirmed she had nothing further to add to what she had already said.)

15. In paragraph 39 the First-tier Tribunal judge states

“I do not believe that he has told the truth about his sexuality”

In paragraph 40 the judge states

“In considering his evidence I also had in mind the medical report prepared on his behalf and did not consider it in isolation after considering what he had to say. So far as the

physical issues are concerned no thought has been given to the possibility of the injuries occurring due to normal everyday events. ....This part of the report does not assist his claim.”

In paragraph 41 the First-tier Tribunal judge says

“As to the psychiatric assessment it all depends on the credibility of the appellant. The writer talks of there being no evidence of him faking his symptoms but she has given no indication as to whether she has considered his previous history of making false claims. Clearly if she had been aware of this she might well have taken a different view as to the credibility of his claimed symptoms. She acknowledges his previous inconsistencies but not the making of the false claims. I am not satisfied that he has told the truth to her anymore than he has told me. I am satisfied that he is not telling the truth about his sexuality....”

16. Ms Gunawala placed considerable weight in her submissions on the statement by the judge that “it all depends on the credibility of the appellant”. She submitted that that statement indicated that the judge had already reached a decision on the credibility of the appellant’s claim *before* he considered the psychiatric evidence; that the reference in the previous paragraph to not having considered the medical evidence in isolation and the reference in paragraph 32 to having considered *all* the evidence was insufficient to illustrate that the judge had indeed not considered the evidence sequentially.
17. The judge considered the appellant’s immigration history including his admission that he had claimed to be a dependant of his EEA national uncle when he was not, that he had studied when he had not, that he had said he could return to Pakistan when first encountered and gave no reason why he could not, that he had remained in Pakistan for some 5-6 years after his claimed kidnapping, the evasiveness of his brother and him when giving oral evidence, the contradictions and inconsistencies in his evidence, the irregularities in the written evidence of his father and his brother, the late additional oral evidence from his brother as to a claimed incident in the park, that the appellant did not go to Manchester’s gay quarter yet claimed to be kissing a man in a public park, the lengthy delay in claiming asylum despite having had previous contact with the respondent and that the Rule 35 report and physical medical report of Dr Reiss did no more than confirm that he had some physical scarring. On the other hand, the judge has not engaged with the statement in Dr Reiss’ report that the appellant was severely depressed, suffered from PTSD and that this could account for his disorganised and inconsistent account. That is not to say that the inconsistencies, contradictions, fake claims and evasiveness are matters that the judge should not have taken into account. Much of what the judge considers are matters external to the appellant and not affected by his mental state. But it is of concern that the specific diagnosis of depression and PTSD and the possible effect this may have had on the appellant’s own oral evidence has not been considered in the overall assessment of the evidence.
18. This is a finely based decision. To state that the psychiatric assessment depends on the appellant’s credibility indicates that the First-tier Tribunal judge has not taken into account the diagnosis by Dr Reiss but has considered that evidence through the prism of an adverse credibility finding rather than in the round as required. The reference to having *not* considered the report in isolation

is insufficient in this case given the content of paragraph 41 of the decision (as set out above). That is not to say that the appellant's credibility is not damaged or that his account can be believed but it does mean, given the potential serious consequences for the appellant and the manner in which the judge seems to have considered the psychiatric evidence that I am satisfied the judge erred in law in failing to have adequate regard to that evidence.

19. I therefore set aside the decision to be remade.

20. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. S12(2) of the TCEA 2007 requires me to remit the case to the First-tier Tribunal with directions or remake it for myself. Given the facts are disputed or unclear and in accordance with the Practice Statement dated 25<sup>th</sup> September 2012 of the Immigration and Asylum Chamber First-tier Tribunal and Upper Tribunal and given the nature and extent of the judicial fact-finding required, it is appropriate to remit the hearing to the First-tier Tribunal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal to the First-tier Tribunal for full hearing.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).



Date 28<sup>th</sup> July 2017

Upper Tribunal Judge Coker