



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/03082/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 12 April 2017

**Decision & Reasons
Promulgated
On 13 July 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MR S J

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji, instructed by AH Law Ltd

For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Mr S J against the decision of the First-tier Judge who in March 2016 heard his appeal against the Secretary of State's refusal of his asylum claim. The judge found him to lack credibility, the basis of his claim being that he was at risk on return to Pakistan on account of his sexuality. There are three grounds of challenge to the judge's decision and I will take them in the order in which Mr Kotas took them rather than the way in which Mr Dhanji took them.

2. The first point is the point concerning claimed contamination of evidence. This arises from what is said by the judge at paragraph 20(a). Mr A, who is said to be Mr S J's partner, was asked in examination-in-chief when his relationship with the appellant started. He said it was in January 2011. At this point Ms Martin the Presenting Officer said that she saw the appellant, who was sitting behind Mr A, say something. "I asked the appellant to explain what he had been doing. He said he had been reciting his holy prayers. I told him he must move to another area of the hearing room". And the argument in this regard is that the judge was wrong to attach any weight to that on the basis that it seems from the witness statement of Counsel, who appeared below, that the judge said she had not seen anything and there was then a clear explanation for this. I think in the end this is not a matter of any particular materiality. It does not seem that the judge attached any particular significance to that. I accept that cumulatively she came to adverse credibility findings and that may have played a part but she did not expressly attach any significance to it.
3. The second point is the matter dealt with at paragraph 20(d) of the judge's decision. Both Mr S J and Mr A had been found by the Home Office to have obtained leave to remain by deception in relation to the use of an English language test certificate. The judge noted that neither of them had appealed against the respondent's decision. The appellant had sought to appeal in the United Kingdom but was found to have no in-country right of appeal. She noted that he had taken no steps to appeal out of country. Mr A had not appealed the decision, he had issued judicial review proceedings. The basis of those proceedings had not been explained. There was no evidence of any judicial review proceedings before the judge and she said there was no evidence to show that Mr A even obtained leave or the proceedings had progressed in any way. She sought to clarify with both of them whether they had contacted ETS and said remarkably neither of them had taken any steps to do this and regarded the failure to appeal against the respondent's decisions and/or pursue the matter with ETS directly as having a significant bearing on the credibility. So there are two points in this, the two reasons as to why she saw this impacting significantly on credibility. And the point of course that Mr Dhanji makes is that appealing out of country would have been completely impossible for Mr S J since it is risk on return that he fears and therefore no remedy along those lines could possibly have been pursued and I think there is merit to that point.
4. As regards not pursuing the matter with ETS directly I think it was said in the grounds or in a witness statement that pursuing the matter with ETS was beside the point. The decision was one of the Secretary of State. I can see some point to the judge's reasoning there in the sense that it may be a matter that could go to provide some evidence going contrary to the evidential burden which it has been held is narrowly discharged by the Secretary of State in ETS cases by means of the usual witness statements of Mr Millington and Ms Collings. But attaching significant weight of one of those two factors to the failure to appeal the respondent's decision does seem to me to be a matter where the judge erred in attaching weight to

that where it was simply in practical, realistic terms, impossible for Mr S J to do that.

5. The main point of concern I think is the question of the evidence of the three witnesses which was not taken into consideration. The judge noted that evidence had been provided by Mr K, Mr U and Mr R and yet referred to a striking absence of evidence as to the claimed relationship from friends, no evidence from a single person who was present at the civil partnership ceremony or celebration and no evidence from either the witnesses at the ceremony although there is some evidence of the celebration in that Mr R attended the party afterwards but he was not able to attend the ceremony itself. But more particularly there is the content of the three witness statements. Mr Kotas argued that they could not really take matters any further since the judge was not satisfied that the attendance at meetings of Imaan, with which organisation I think Mr K and Mr U are concerned, was anything more than an attempt to bolster the appellant's claim but I think in a way that puts the cart before the horse. The judge might have taken a different view of the evidence of attendance of meetings of Imaan if she had taken into account the evidence of Mr S J and Mr U who provided both of them some detail about the way in which they first met the appellant and Mr A and some detail as to their observation of the relationship between them. In my view that is the main matter that is a cause of concern in this case. It seems to me that it goes very much to the heart of the credibility findings given that the central issue, that of the appellant's sexuality, was disbelieved and yet we have three witness statements which were not taken into account which could be said to bear materially on the claimed sexuality.
6. So accordingly I find there are material errors of law in the judge's decision and therefore the decision is set aside and I think it is most appropriately to be dealt with by a rehearing in the First-tier Tribunal since these matters are so central to the case.

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 or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 25 April 2017

Upper Tribunal Judge Allen