



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04924/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 28 September 2017**

**Decision & Reasons
Promulgated
On 5 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**S S H
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel, instructed by Milestone Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Aujla (the judge), promulgated on 30 June 2017, in which he dismissed the appeal on all grounds. That appeal arose from the Respondent's decision of 13 May 2017, refusing protection and human

rights claims made by the Appellant on the basis that he was gay and would be at risk on return to Pakistan for that reason.

The judge's decision

2. The judge was clearly not impressed with the Appellant's own evidence and the lack of documentary evidence in support of his claim (paragraphs 43 to 49). Particular emphasis was placed upon the failure of the Appellant to have made a protection claim sooner than he did. The judge found that the Appellant was not in fact gay and had fabricated his entire account (paragraph 50).
3. In the context of the appeal before me paragraph 42 is of central importance and I set it out in full:

“Whilst I have considered the evidence of the three witnesses in addition to that of the Appellant's partner, for the reasons I have given below, I have serious concerns about the Appellant's own credibility. I find that the evidence of the three witnesses was not an independent source of evidence. They were the Appellant's friends who no doubt were attempting to advance his claim regardless of what the facts were. Their evidence and the photographic evidence in the bundle was nothing more than self-serving. As I have serious concerns about the Appellant's own credibility, I have concluded that the evidence of the three witnesses, and the photographic evidence, did not assist me much and I therefore choose not to give much weight to that evidence.”

Underlining added

The grounds of appeal and grant of permission

4. Ground 1 asserts that the judge has erred in his assessment of the witnesses' evidence. It is said that the judge has failed to consider the Appellant's own evidence in the context of their evidence. It is also said that the judge was wrong to have regarded their evidence simply as being self-serving without giving any additional reasons as to why he was placing no weight upon it. Ground 2 suggests that the judge erred in his application of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Ground 3 indicates that there has been a misdirection in the application of HJ (Iran) [2010] UKSC 31. It is said that in paragraph 51 the judge has misstated the law: the avoidance of persecution did not have to be the only reason why a gay man may act discretely in their country of origin.
5. Permission to appeal was granted by First-tier Judge Lambert on 31 July 2017. Although the wording of the grant is not entirely clear, both representatives at the hearing before me were agreed that permission must have been granted on all grounds or else the point concerning the HJ (Iran) issue would be of no relevance.

The hearing before me

6. Mr Briddock referred me to paragraph 42 (set out in full above). He submitted that in cases concerning sexuality there would very often be a number of witnesses, all of whom would know the Appellant and could in one sense be described as friends. However, this did not mean that their evidence could properly be discounted simply on that basis. He submitted that in any event one of those witnesses had not in fact been a friend but a member of an organisation (NAZ), which had interacted with the Appellant over the course of time. It was said that all three witnesses had provided material evidence relating to the Appellant's sexuality. If the judge had found the witnesses to be unreliable, either because they were lying or had been manipulated in some other way by the Appellant, and had provided independent reasons for such a finding, there would be no error. However, the judge appears to have rejected their evidence out of hand, and had put the "cart before the horse".
7. Mr Armstrong submitted that weight was a matter for the judge alone. The judge had clearly found against the Appellant in a number of respects, and had made this clear in paragraph 42. Even if the judge had been wrong in his treatment of the witnesses' evidence it was not material in light of the decision as a whole.

Decision on error of law

8. As I announced to the parties at the hearing I conclude that there are material errors of law in this case.
9. The evidence in any appeal has to be assessed in the round. I fully appreciate that the judge has stated that this is what he did. However, the contents of paragraph 42 give rise to real concerns as to what approach was in fact adopted in relation to the witnesses' evidence. There is clear reference to the adverse findings relating to the Appellant's own evidence in this paragraph, and such findings were quite clearly something that the judge was bound to take account of. When it comes to the evidence of the three witnesses though, the judge makes four comments which give rise to the real risk that he has rejected their evidence purely on the basis that they were known to the Appellant. First, he states that the witnesses' evidence was not from an independent source. One of the witnesses was clearly not in fact a friend of the Appellant but somebody who worked for an organisation (NAZ). Second, and in any event, the fact that witnesses are not wholly independent of an Appellant (friends, for example) does not in and of itself mean that their evidence should be rejected out of hand. Third, the judge states that the witnesses "no doubt were attempting to advance his claim regardless of what the facts were". This strongly indicates that he was starting from the position that their evidence was inherently unreliable, and their status as friends justified a rejection of their evidence, without more. Fourth, their evidence is

deemed to be “self-serving”. This epithet is potentially dangerous when assessing credibility. It is not of itself justification for the rejection of potentially material evidence. This much is clear from the recent Upper Tribunal decision in SS [2017] UKUT 164 (IAC).

10. No other freestanding reasons have been given by the judge as to why he was rejecting all of this evidence. The only basis upon which he was proceeding (aside from an erroneous rejection based solely upon the fact that the witnesses were known to the Appellant) was that he had concerns about the Appellant’s own evidence. These concerns are clearly expressed and, seen in isolation, appear to have been open to the judge. The point is however, that the evidence had to be assessed as a whole, including what the witnesses had to say. This could not have been done on a sound basis if the witnesses’ evidence had been rejected for unsustainable reasons.
11. I also note the following matters. Having read the relevant witness statements for myself, I am satisfied that all three witnesses had material evidence to give regarding the Appellant’s sexuality. Their evidence was direct in nature, and capable of supporting his claimed sexuality. I also note that three witnesses were not cross-examined by the Presenting Officer at the hearing, and that in her submissions she relied upon the reasons for refusal letter and had nothing to add (see paragraphs 32 to 35). Therefore, whilst the witnesses’ evidence would not necessarily have to be taken at face value, it had not been tested and had been left effectively unchallenged before the judge. This adds to my concerns about the judge’s treatment of the witnesses’ evidence overall.
12. Overall, I conclude that the judge has erred in relation to his approach to the witnesses’ evidence.
13. I have considered whether the errors of approach are material in this case. It is quite true that the judge made a number of findings against the Appellant, and these make it a lot more difficult for him to succeed. Having said that, if the witnesses’ evidence had been accepted, it clearly provided support for the Appellant’s claim to be gay, and was capable of affecting the outcome of the appeal. I find the judge’s errors are material in this regard.
14. In relation to the HJ (Iran) point there was no suggestion by Mr Armstrong that the judge had in fact correctly applied the law. There is a clear misdirection in paragraph 51 of the decision. The fear of persecution need only be an operative reason for acting discretely, and it does not need to be the sole reason. The errors relating to the core factual issue of whether the Appellant is gay or not is not therefore rendered immaterial by what the judge has said in paragraph 51.
15. In light of the above I set aside the judge’s decision.

Disposal

16. Both representatives were agreed that if I were to find there to be material errors of law this appeal would have to be remitted to the First-tier Tribunal for a complete re-hearing. Having regard to the nature of the errors I have found and paragraph 7.2 of the relevant Practice Statement, I deem it appropriate to take this course of action.
17. The appeal is therefore remitted to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law.

I set aside the decision of the First-tier Tribunal.

I remit this appeal to the First-tier Tribunal.

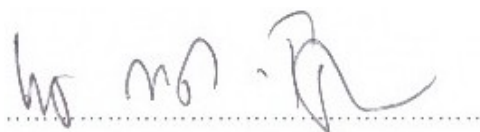
Directions to the First-tier Tribunal

1. **There should be a complete rehearing of this appeal with no findings of fact preserved;**
2. **The core factual issue is whether the Appellant is in fact gay;**
3. **If the Appellant is in fact gay there will need to be consideration of how he might act on return to Pakistan, and the reasons for any such actions, in light of HJ (Iran).**

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 his 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: 3 October 2017

Deputy Upper Tribunal Judge Norton-Taylor

