



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03415/2018

THE IMMIGRATION ACTS

Heard at Field House
On 10th December 2018

Decision & Reasons Promulgated
On 20th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

RC

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Miah of Counsel instructed by Universal Solicitors
For the Respondent: Ms Isherwood, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Oliver promulgated on the 6th June 2018 whereby the judge dismissed the appellant's appeal against the decision of the respondent to refuse the appellant's claims for asylum, humanitarian protection or relief on the grounds of articles 2,3 and 8 of the ECHR.
2. I have considered whether or not it is appropriate to make an anonymity direction. As this case concerns the personal life, specifically the sexuality of the appellant it is appropriate to make an anonymity direction.

3. Leave to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Storey on 29th October 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.
4. The leave refers to a decision made in the case of Mr HUT, similarly anonymised. Mr HUT is allegedly the partner of the appellant. HUT had an appeal heard before Judge G Clarke. Judge Clarke allowed the appeal. The appeal before Judge Clarke was heard on the 17th April and the decision was promulgated on the 24th May 2018. In the decision Judge Clarke found that HUT was a homosexual and was in a long term relationship with the appellant herein, thereby finding that the appellant was also a homosexual. The appellant had given evidence in the appeal of HUT. A copy of the decision in the case of HUT has been submitted as part of the appeal to the Upper Tribunal.
5. Judge Storey in granting leave questions why the decision of Judge Clarke was not put before Judge Oliver raising the issue that the decision by Judge Oliver was not promulgated until 6th June 2018. Further Judge Storey questions why the decision of Judge Clarke was not adverted to in the grounds seeking permission to appeal at the First-tier Tribunal level. Judge Storey raises the prospect that had Judge Oliver considered the “earlier” positive findings on credibility the approach of the judge to credibility and findings may have been different.
6. Judge Oliver heard this appeal on the 11th April 2018 but did not promulgate his decision until 6th June 2018. The hearing in the case of HUT took place on the 17th April and the decision was promulgated on the 24th May 2018. Accordingly the hearing for this appellant had been concluded prior to the case of HUT being heard.
7. At the hearing before me I raised the issue of whether an application had been made to join the two cases. Mr Miah sought to make the point that the respondent had not made application to the Tribunal to join the cases. With respect it was open to the appellant’s and HUT’s representative, Universal Solicitors who were acting for both, to apply to have the cases joined. No explanation was given as to why no application was made on behalf of the appellant and HUT to join the appeals. It does not appear that any application was made prior to the hearing nor was any application apparently made at the hearing. If no application was made, Judge Oliver cannot be criticised for dealing with the appeal on the basis of the evidence that was before him.
8. Equally once the decision by Judge Clark was issued the representatives did nothing to bring the judgment to the attention of Judge Oliver. The judge cannot be criticised dealing with the appeal on the basis of the evidence that was before him.
9. The appellant representative is arguing that the decision of Judge Clarke should have been provided to Judge Oliver as Judge Oliver had delayed

producing his decision. Yet they appear to have taken no steps until after the decision of Judge Oliver was issued.

10. In making the submission counsel sought to rely upon the case of Chicaiza 2002 UKIAT 01200, wherein it asserted that an adjudicator hearing an appeal for one member of a family, where there are decisions of other members of a family, should take into account those decisions, although the weight to be given to the findings of fact is a matter for the adjudicator/judge in the instant case. Further the case indicates that where one member of a family has been recognised as a refugee or granted asylum, a decision to refuse another member applying on the same basis must be carefully reasoned.
11. There a number of cases that deal with family members and decisions made. The case of:-

(a) MJ (Iran) v SSHD (2008 EWCA Civ 564. In which the following is noted:-

15 It is undesirable but unfortunately not uncommon in the asylum system to find that siblings or spouses' appeals have been separately heard. Where the first has succeeded, the Home Office routinely resists the introduction of either the record or the determination into the second one's appeal. Such resistance is generally justified because in principle no factual *res judicata* or issue estoppel is created by one determination in relation to others. In the case of Otshudi v SSHD [\[2004\] EWCA Civ 893](#), giving a judgment with which the Vice-Chancellor and Chadwick LJ concurred, I said:

"1. This appeal comes before the court by permission of Kay L.J. He was much influenced by the fact that, some ten months after an adjudicator had dismissed Mr Otshudi's appeal, another adjudicator, on almost identical evidence, had allowed his brother's appeal. For reasons to which I shall shortly come, this cannot furnish a ground of legal challenge...

....

10. Eleven days after the IAT dismissed Mr Otshudi's appeal, his brother's asylum and human rights claims, founded on the same evidence, were allowed by a different adjudicator, Mr L D Sacks. We are told today that the Home Secretary has not sought to appeal the decision. The fact of this discrepant decision was drawn to the attention of the IAT when permission to appeal to this court was sought but the IAT made no reference to it in their refusal. Although this is recounted in the appellant's skeleton argument, and although the single Lord Justice who gave permission to the appeal was concerned by it, no submission of law is now founded on the outcome of the brother's claim, and rightly so.

11. This is not the class of case which involves what Laws LJ has called "a factual precedent" -- for example a finding about the political situation in a given country at a given moment. It is an illustration, if an alarming one, of the fact that two conscientious decision-makers

can come to opposite or divergent conclusions on the same evidence. But it is no more material to the legal soundness of the present adjudicator's decision than hers would be to the soundness of the second adjudicator's decision."

This court went on, it should be said, to invite the Home Office to give very serious consideration to the possible material injustice that might nevertheless be reflected in such discrepant decision-making (see also, in this regard, *Macdonald's Immigration Law* paragraph 18.144).

- (b) *Otshudi v SSHD* [2004] EWCA Civ 893 also makes the point, in dealing with discrepant decisions between two brothers. It has to be accepted on the facts that the discrepant decisions were 11 months apart.
 - (c) *AS & AA (Somalia)* 2006 UKAIT 00052 set down that a judicial determination stand as a determination of the issues between the parties but does not govern later litigation between other parties.
 - (d) By comparison see the case of *AA & AH v SSHD* 2007 EWCA Civ 1040 wherein it was indicated that a previous decision by an adjudicator may be a starting point where there is a material overlapping evidence. Even then whilst the first tribunal decision may be a starting point it was for the second tribunal to evaluate the evidence independently and decide the case before them on the merits.
12. With regard to the present case it has to be noted that nobody sought to put the decision of Judge Clarke before Judge Oliver. It does not appear that the appellant's representative sought to do so or sought to have the cases linked. In that event the judge cannot be criticised for dealing with the case on the basis of the evidence that was before him.
 13. Secondly there would be an issue as to whether or not there was any significant difference between the two cases which might impact upon the approach to be taken with regard to credibility. As indicated the decision of Judge Clarke has been provided to the Tribunal. In respect of matters impacting upon the credibility of the parties it has to be noted that in this appellant's case there were credibility issues as to whether the appellant had submitted false English-language test certificate in the past. In the case of HUT there was no suggestion of false certificates or attempts to mislead the immigration authorities. There were therefore issues which impacted upon the credibility of the appellant's account in the present case which were not present in the case of HUT.
 14. In considering the appellant's position Judge Oliver rejected his claims to be a homosexual. However in paragraph 37 the judge makes alternative findings in the event of him being wrong with regard to the conclusion that the appellant is not a homosexual. The judge has noted that the appellant although in the

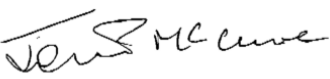
United Kingdom had on his account kept his sexuality discreet and not disclosed such to members of his family, including an uncle with whom he lived. It was stated that the uncle became aware of the appellant's sexuality when he opened letters from the tribunal to the appellant. Despite that since that period the uncle has continued to support the appellant but the appellant continues to live his life discreetly.

15. In the case of HUT consideration had been given as to whether or not the appellant could relocate within Bangladesh or whether when he returned through fear of persecution he would hide his sexuality. The conclusion was that HUT would not be able to live his life as he wished to as a homosexual by reason of a fear of persecution.
16. By comparison in respect of the appellant the judge was satisfied that the appellant was living his life discreetly not by reason of the fear of persecution but rather by reason of family pressures and not wishing to upset his family. The judge concluded that if the appellant were return to Bangladesh he would continue to live his life discreetly. That was a finding of fact that the judge was entitled to make on the evidence.
17. The issue was then raised as to whether or not the appellant could live in an area in Bangladesh as a discrete homosexual without a risk of persecution. It was not a point that had been raised in the original grounds of appeal. The appellant's representative had to apply to amend the grounds of appeal in order to include the point. Even though it came at such a late stage, no issue was taken by the respondent's representative.
18. Mr Miah sought to argue that the conclusions by the judge that the appellant could live in a specific area of Dhaka provided he lived his life discreetly was not made out by the background evidence. He sought to submit that Judge Clark has taken a more detailed consideration of the evidence. With respect whilst Judge Clarke has quoted at length section of the background evidence the conclusion by Judge Clarke was to the effect that HUT would have to hide his nature by reason of the fear of persecution.
19. The conclusion by Judge Oliver was that the appellant would be discreet so as not to upset his family rather than by reason of the fear of persecution. Thereafter the judge has relied upon the background information submitted by the appellant's representative. Extracts have been produced from the Home Office Country Policy and Information Note on Bangladesh and sexual orientation. As noted whilst there are statutory provisions no arrests and prosecutions have been noted under the statutory provisions making homosexuality illegal the judge had specifically noted the background information. At page 74 of the appellants bundle it was noted that Dhaka was the centre for the LGBT movement which provided a supportive environment. Whilst the environment was closed and private it existed.

20. Having considered the background evidence the judge on an alternative basis has found that the evidence was such that the appellant would live discreetly and that he could live in parts of Dhaka as a discrete homosexual. The judge has adequately examine the evidence and given valid reasons for the conclusions reached.
21. In the circumstances there is no error of law in the judgement. The judge was entitled to deal with the appeal on the basis that he has.

Notice of Decision

22. I dismiss the appeal on all grounds.

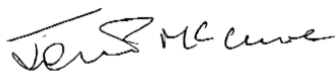
Signed 

Deputy Upper Tribunal Judge McClure

Date 13th December 2018

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



Signed

Date 13th December 2018

Deputy Upper Tribunal Judge McClure