



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10269/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3 May 2018

Decision & Reasons Promulgated
On 24 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

M E H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza, instructed by JKR solicitors

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 7 October 1997 who came to the UK in 2011 aged 14 as a visitor. On 30 March 2017 he applied for asylum. His application was refused on 28 September 2017. He appealed to the First-tier Tribunal where his appeal was heard by Judge Oliver. In a decision promulgated on 13 December 2017 the appeal was dismissed. The appellant is now appealing against that decision.
2. The appellant's asylum claim is based on his sexuality - that he is gay. He claims that his family would kill him if he returned to Bangladesh.

3. The respondent did not accept that the appellant is gay or that he would be at risk from his family if returned to Bangladesh. The respondent also found that the appellant could in any event relocate to Dhaka if he were genuinely in fear of his family.

Decision of the First-tier Tribunal

4. The appellant's appeal in the First-tier Tribunal was heard by Judge Oliver. Judge Oliver found that the appellant had failed to demonstrate he was gay. He gave the following reasons:

- (a) The appellant could not remember the name of one of the two gay bars he claimed to have visited or the name of the gay organisation he claimed his friend established.
- (b) Although one of the witnesses who attended the hearing in support of the appellant said he had seen the appellant having sex in a gay bar the judge believed this could be fabricated, stating at paragraph 27

"One of his witnesses said that he had seen the appellant having sex in gay bars but I assume because of the limits of public decency that he was not referring to any full sexual act. More limited behaviour is not impossible to fabricate."

- (c) The appellant gave contradictory explanations for why a friend who he claimed knew of his sexuality had not attended the hearing. The contradiction was that he said he had asked his friend to attend but his friend had declined whereas he also stated that he was no longer in contact with this friend.
 - (d) The appellant gave inconsistent reasons why he did not reveal his sexuality when presented with a One-Stop Notice in February 2014. The inconsistency identified by the judge was that the appellant stated he knew nothing of the application as it was made by his aunt but then said he did not mention he was gay because he did not know he could claim asylum on this basis.
5. The judge also found that even if the appellant were gay he would be discreet if returned to Bangladesh. His reason for this finding was that the appellant's own account was that he had not expressed his sexuality outside the confines of a gay environment and had only informed three people of his sexuality.
 6. The judge also considered in the alternative the appellant's risk on return if he were gay and concluded that he could safely return to Dhaka. At paragraph 28 the judge quoted the respondent's 2016 policy document, stating:

"It would not in general be unreasonable or unduly harsh for such a person able to demonstrate a real risk in his home area because of his particular circumstances to relocate internally. Consideration must be given to the reach of the family network and how persistent and influential they are. Internal relocation is not the answer if it depends on the person concealing their sexual

orientation or gender identity in the proposed new location for fear of persecution.”

Grounds of Appeal

7. The grounds of appeal argue that the judge failed to properly assess the oral evidence of witnesses about the appellant’s sexual activity. The grounds observe that one of the two witnesses mentioned seeing the appellant having sex in gay bars but at paragraph 27 the judge assumed this did not mean full sex without asking the witness what in fact was meant. This ground also refers to the other witness for the appellant who stated he had had sex with the appellant twice. The argument made in the grounds is that the judge ignored this evidence without explaining why.
8. The second submission made in the grounds is that the judge failed to engage with the objective evidence about the risk of persecution faced by gay men in Bangladesh. It is argued that it is contrary to the objective evidence that was before the Tribunal to reach the conclusion that the appellant could safely relocate within Bangladesh.

Submissions

9. Mr Reza, on behalf of the appellant, focused on the first ground arguing that the judge failed to engage with the evidence of the appellant’s two witnesses concerning the sexual activity of the appellant.
10. Ms Everett accepted that the judge had only dealt briefly with the witness evidence but argued that the engagement with the evidence was sufficient. She maintained that the judge gave cogent reasons for not finding the appellant credible which meant that even if the witness’ evidence about sexual activity had not been addressed sufficiently there were adequate reasons to justify the credibility finding.
11. In respect of the argument that the judge failed to address the objective evidence regarding risk to gay men in Bangladesh, Ms Everett’s position was that the evidence shows that gay men behaving discreetly would not be at risk.

Analysis

12. In addition to his own evidence, the appellant relied on two witnesses to establish that he is gay. Both witnesses gave oral evidence as well as short written statements. One of the witnesses stated in his written statement the following.

“I met him [the appellant] at Volt in early September 2017. This is a gay club where people go for meeting with other gay men and to have sex...I confirm that twice I had sex with [the appellant].”

13. The other witness stated in his statement:

“I have seen [the appellant] dancing, kissing and having sex with other gay men at clubs....I met him at a gay club called Gay Bar in January 2017. This is a club where people go for having gay sex.”

14. The evidence of both witnesses was that they had been to clubs with the appellant where men engage in sex and had either seen the appellant having sex with another man or had themselves had sex with him. Given the core issue in the appeal was whether the appellant was gay the evidence of these two witnesses about the appellant's sexual activity was highly material.
15. The judge has made no reference to the claim by one of the witnesses to have had sex with the appellant. At paragraph 25 the judge summarised the witness's evidence but only mentioned his claim to have been to gay clubs with the appellant, not that he claimed to have been a sexual partner of the appellant. At paragraph 27, where the judge set out his findings, no mention is made of the fact that this witness claimed to have had sex with the appellant and no finding is made as to whether that assertion was accepted or not. In my view, it was an error of law to not consider, and to not make a finding in respect of, the witness's claim to have had sex with the appellant.
16. With regard to the evidence of the other witness, the judge mentioned at paragraph 23 that he claimed to have seen the appellant having sex but at paragraph 27 stated that he assumed that because of the "limits public decency" he was not referring to "any full sexual act". This is, in my view, a misunderstanding of the evidence. It is clear from the written statement of this witnesses that he said he saw the appellant having sex. The judge was entitled to accept or reject this evidence but not, as he appears to have done, to assume that the witness meant something different to what he said because of an assumption (unsupported by evidence and which was not put to the witness) as to what constitutes public decency in a gay bar.
17. The judge's finding that the appellant, even if gay, could safely relocate to Dhaka also cannot stand. This is because the judge's conclusion on internal relocation is underpinned by a finding of fact that the appellant would be discreet and would not conceal his sexual orientation because of fear of persecution. This finding cannot be separated from the other findings about the appellant's claimed sexuality and without a sustainable finding on whether (and if so, why) the appellant would be discreet it is not possible to determine in light of the objective country evidence that was before the judge whether the appellant would, if gay, be at risk in Dhaka.
18. The decision therefore will need to be made afresh with none of the factual findings preserved. I have carefully considered whether I am able to proceed to remake the decision based on the evidence that was before the First-tier Tribunal and the additional objective country information which Mr Reza sought to rely on if the appeal were remade. Given the extent of further fact-finding that will be necessary and that the appellant's credibility will need to be considered afresh I consider this to be an appeal where it is appropriate for the matter to be remitted to the First-tier Tribunal.

Decision

19. The decision of the First-tier Tribunal contains a material error of law and is set aside.

20. The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

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

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a horizontal line.

Date:

21 May 2018