



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12429/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Decision & Reasons Promulgated
On 2 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

A H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Franco, Schneider Goldstein Immigration

For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on 18 February 1990. He arrived in the United Kingdom on 24 October 2009 and eventually applied for asylum on 19 June 2017 on the basis that he was a gay man from Bangladesh and feared persecution if returned there. This application was refused in a decision dated 10 November 2017. The Appellant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Hussain for hearing on 3 January 2018. In a Decision and Reasons promulgated on 1 February 2018, the judge dismissed the appeal concluding that he was not satisfied that the Appellant is a homosexual [46].

2. Permission to appeal was sought in time on the basis that the judge had erred in a number of material respects:-

- (1) At [40] in casting speculative aspersions with regard to the witness statement of the Appellant where he held "*in my view, not everything said in it are the appellant's words. It seems to me quite likely that the statement has been embellished with the benefit of legal knowledge by those who have composed it.*"
- (2) At [45] in his assessment of the evidence of [SK] who gave evidence that the Appellant is gay and that he knows this because he is also gay. The judge assessed this evidence as follows:-

"remarkably, he was unable to produce a copy of the determination which would have made clear the basis on which his asylum claim was granted. Whilst I am prepared to accept that [SK] may have been granted asylum because of his Rohingya ethnicity, in my view it is more likely than not that this person has come along to the hearing to support the asylum claim of the appellant."

- (3) It was asserted that the judge had failed to assess properly or at all his evidence in relation to corroborating the Appellant's sexual orientation.
- (4) It was further submitted that the judge had erred in his assessment of the evidence on behalf of the organisation Naz at [43] and [44] in that the judge speculated or assumed that the Appellant would have had the benefit of advice and support from Naz, and on that basis would not have delayed in making his asylum claim.

3. Permission to appeal was granted on renewal to the Upper Tribunal by Upper Tribunal Judge Pitt in a decision dated 15 May 2018 in the following terms:

"There are obviously difficulties for this appellant to address, for example the timing of his claim and giving unreliable evidence as to having an interpreter in his interview; see [45]. It remains arguable, however, that the finding at [40] that the witness statement 'has been embellished with the benefit of legal knowledge by those who have composed it', a serious allegation, is not sufficiently well-evidenced and should have been put to the appellant and his legal representatives at the hearing on that basis rather the (sic) judge merely raising 'a lack of clarity' see [17]. It is also arguable that the mere fact of an LGBT organisation providing letters in support of a number of protection claims is not a reason in itself for placing no weight on that evidence; see [43]. It is arguable that insufficient reasoning was provided for the finding that someone who has undisputedly been recognised as refugee (sic) was truthful about one part of his evidence but lied in another; see [45].

All grounds are arguable."

Hearing

3. At the hearing before me, Mr Franco on behalf of the Appellant, sought to admit into evidence the appeal decision in the case of [SK]: PA/02775/2017. Ms Pal on behalf of the Respondent had no objection. Mr Franco pointed out that it was clear from this decision of Judge of the First-tier Tribunal Chamberlain that the witness's case had

been put forward on the basis that he is a gay man, and although he is from Myanmar he grew up in Bangladesh and in her findings and reasons the judge at [50] expressly found that it was reasonably likely that [SK] is gay and that he is in a relationship with another man, that he was openly gay except for when he is in the Bengali community, and this was through fear because the Bengali community do not approve of homosexuality. She further found that [SK] would like to live an openly gay lifestyle. On that basis, at [55], having found that he is gay, she did not go on, or need to consider the issue of risk on return by reason of his Rohingya ethnicity.

4. Mr Franco further sought to rely on the terms of the grant of permission by Upper Tribunal Judge Pitt and the grounds as set out in the application for permission to appeal. He submitted in total that the judge's approach to the appeal was vitiated by error of law.
5. In her response, Ms Pal sought to defend the judge's decision. She submitted that the judge's finding in respect of Naz was open to him on the basis of the material before him. In respect of the Appellant's witness statement and [45] of the judge's Decision and Reasons she accepted it was perhaps an error not to raise it with the representatives if the judge had concerns about the manner in which the witness statement had been drafted. However, she sought to rely on the fact that the judge had made additional findings in respect of the Appellant's credibility at [41] to [43]. In respect of [SK], the decision allowing his appeal was not before the judge and on that basis he was entitled to find that the evidence he gave offered little support. She submitted that the judge gave adequate reasons for his findings, albeit another judge may have come to a different conclusion, the judge had properly considered the issues before him and found the Appellant not to be credible.
6. In reply Mr Franco submitted it was not open to the judge to find that Naz could give the Appellant asylum advice or advocacy as that is not their role and they are not competent to do so and there was no proper evidential basis before the judge on which he could make such a finding. He submitted that the judge cannot properly infer that Naz has given the Appellant asylum advice. In respect of the role of the witness and his evidence, he submitted that this was crucial evidence that was erroneously discounted by the judge on the speculative basis that he was granted asylum because he is Rohingya rather than because he is gay and this is a material error that goes to the key issue in the case, i.e. the Appellant's sexual orientation.

Findings

7. I find material errors of law in the decision of Judge of the First-tier Tribunal Hussain. Dealing first with the potential corroborative evidence of [SK], which was dealt with at [45] by the judge, whilst it is the case that there was no copy of the decision in respect of [SK]'s asylum appeal before the Tribunal, the judge failed to give proper or adequate reasons for rejecting his evidence that he had been granted asylum on the basis of his own sexual orientation. Had the judge wanted to obtain a copy of his decision that would have been a relatively straightforward task, either through ARIA or through the assistance of the Respondent. In any event, the judge's finding "*it is more likely than*

not that this person has come along to the hearing to support the asylum claim of the Appellant” does not provide sufficient reasoning for rejecting the evidence of that witness without more.

8. At [46] of the decision, the judge simply went on to find he was not satisfied that the Appellant is a homosexual, which does not properly accord with the evidence before him in the absence of cogent reasons for rejecting that evidence. In relation to the role of the organisation Naz, the judge recorded the Appellant’s evidence about Naz and the letter from Naz at [21]. The evidence of the Appellant was that Naz provides help and mental support to gays and lesbians, for example he had had an HIV test there and that they organised a party where he had met other gay people and had regular discos. I find there was no evidential basis upon which the judge could find that Naz would advise the Appellant about the asylum process and that his findings as to the weight to be attached to the letter from Naz are thus unsafe, bearing in mind at [43] that the judge apparently disregarded the letter on the sole basis that “*I have on many an occasion come across letters from this organisation written by the same person as the letter relied on by the Appellant, namely, Asifa Lahore.*” Asifa Lahore is the South East Asian Men’s sexual health worker and clearly writes letters on behalf of the organisation in that capacity. That in itself, in my view, is insufficient reason to entirely disregard that evidence simply on the basis that the author has provided letters in respect of other gay asylum seekers from South East Asia.
9. In respect of the Appellant’s witness statement, the judge’s finding at [40] is somewhat strange in that it is inevitable when taking evidence, particularly through an interpreter, that the language utilised is likely to be that of the lawyer through the prism of the interpreter’s language, thus, to place weight as the judge did at [40] on the fact that not everything said in it are the Appellant’s words, whilst true, does not in my view provide a sufficient basis for disregarding the contents of that statement. Further, if as it appears, this was a matter of concern to the Judge then it was incumbent upon him to raise this at the hearing, in order to give the Appellant’s representative the opportunity to address him on the point.
10. I find for all those reasons that the judge’s overall finding that he was not satisfied that the Appellant is a homosexual man in light of fairly substantial evidence before him as to the Appellant’s sexual orientation from a live witness, [SK], in addition from the Appellant’s own evidence from photographs and from the organisation Naz, that the judge’s finding is unsafe and unsustainable.

Notice of Decision

11. I set aside the decision of First-tier Tribunal Judge Hussain. I remit the appeal for a hearing *de novo* before the First-tier Tribunal, ideally at Taylor House rather than at York House, given that the Appellant’s residential address is in E1 which clearly would appear to fall in the catchment of Taylor House not York House.

DIRECTIONS

- (1) The appeal should be listed for two hours with a Bengali (non-Sylheti) interpreter.
- (2) The Appellant's representatives are requested to produce a new indexed and paginated bundle, including the decision and reasons of First tier Tribunal Judge Chamberlain in respect of [SK].

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 *Rebecca Chapman*

Date 29 July 2018

Deputy Upper Tribunal Judge Chapman