



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

Appeal Number: PA/05748/2017

THE IMMIGRATION ACTS

**Heard at Newport
On 4 January 2019**

**Decision & Reasons
Promulgated
On 8 February 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**MR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanki, instructed by Duncan Lewis Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this discretion could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Albania who was born on [~] 1994. She arrived in the United Kingdom clandestinely on 24 January 2017. On 2

May 2017, the appellant claimed asylum. The appellant's claim is that she is gay and that, following a marriage which she was pressured to enter into by her family, and which has since been dissolved, her family consider that she has dishonoured them and has threatened to kill her.

3. On 30 May 2017, the Secretary of State refused the appellant's claims for asylum and humanitarian protection and on human rights grounds. Whilst the Secretary of State accepted that the appellant had married and that the marriage had subsequently been dissolved, the Secretary of State did not accept that the appellant was gay or that, as a consequence, she would be at risk from her family on return to Albania.

The First-tier Tribunal Decision

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 21 February 2018, Judge Cohen dismissed the appellant's appeal on all grounds. The judge made an adverse credibility finding and rejected the appellant's account that she is gay and so would be at risk on return to Albania. The judge also found that, even if he accepted the appellant's account, her claim failed as she would be able to obtain a 'sufficiency of protection' from the Albanian authorities.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal but on 26 August 2018, the Upper Tribunal (DUTJ Chapman) granted the appellant permission to appeal.

The Issues

6. The appellant's grounds, which were developed by Ms Solanki in her oral submissions, fall under three headings. Ground 1 challenges the judge's adverse credibility finding on a number of bases. Ground 2 challenges the judge's finding in relation to 'sufficiency of protection' on the basis that at para 35 the judge was wrong to prefer the decision of LC (Albania) v SSHD [2017] EWCA Civ 351 to the expert report on the erroneous assumption that LC (Albania) was a country guidance decision when, in fact, it was a decision of the Court of Appeal that was not concerned with country guidance at all. Ground 3 challenges the judge's decision to dismiss the appeal under Art 8, in particular in the application of para 276ADE of the Immigration Rules (HC 395 as amended) in concluding that there were not "very significant obstacles" to the appellant's integration in Albania.
7. During the course of the parties' submissions, Mr Howells, who represented the Secretary of State, accepted that Ground 2 was made out, in that LC (Albania) was not a country guidance case and the judge was wrong in para 35 to so regard it. However, he submitted that error would not be material unless the appellant could establish that the adverse credibility finding was flawed under Ground 1.
8. It was common ground between the parties that Ground 3 was parasitic upon Ground 1 as the only arguable basis upon which the appellant could

succeed under para 276ADE(1)(vi) in establishing that there were “very significant obstacles” to her integration in Albania was if she could establish the adverse consequences to her on return as a result of her sexual orientation.

9. As a consequence, both representatives’ submissions focused upon Ground 1.
10. Ms Solanki made a number of detailed points, relying upon paras 7-23 of her grounds. It became apparent during the course of Mr Howells’ submissions that he accepted that a number of these points were well taken.
11. I turn now to consider the judge’s reasons for his adverse credibility finding at paras 26-34 and the detailed submissions made by Ms Solanki and Mr Howells.

The Judge’s Reasoning

12. The appellant’s claim is that she is gay. She claims that she began to experience feelings for members of her own gender when she was around 18 years of age and she had her first relationship at university when she was 18 years old. She claims that she was not open about her sexuality because she feared being ostracised or worse. She was pressurised by her family to marry a man (“D”) who lived in the UK. In November 2016, she went through a religious marriage with him in Albania. However, as a result of her sexuality, the marriage was not successful and ended on 18 April 2017. When she informed her family about this, she was told that she had damaged the family honour and that, having told them that she is gay, they threatened to kill her if she returned to Albania.
13. At paras 26-34 of his determination, the judge gave his reasons for disbelieving the appellant’s account as follows:
 - “26. The appellant claims to fear persecution upon return to Albania as a result of her sexuality. She claims to be a lesbian.
 27. The appellant was apprehended by immigration officers and interviewed. She indicated that she had come to the UK to form a family unit with her husband and his child. Furthermore, she underwent an asylum interview and still did not raise a claim in respect of her sexuality claiming that she was scared due to religious and family reasons because she had left her husband and damaged the family honour. I find that if the appellant genuinely feared persecution due to her sexuality that she would have raised this claim at the earliest available opportunity and find her failure to do so to be damaging to her credibility.
 28. The appellant claimed that she came to the UK because she hoped that she could live openly and like the freedom that she experienced in the UK. I find this to be discrepant with the appellant’s actions in failing to disclose her sexuality when given the opportunity in the interviews referred to above.
 29. The appellant claimed that she could not tell her parents about her sexuality because she feared them and their reaction and she

could not disclose her sexuality in interview because she was afraid that information concerning the same would find its way back to the Albanian community and to her family. In these circumstances, I find the appellants evidence that she disclosed her claimed sexuality to her family of her own accord to be discrepant with her earlier evidence and further damaging to her credibility.

30. The appellant claimed to enjoy the freedom that she felt in the UK but despite this, when in London where there are many LGBT groups and clubs did not attend any of the same which I find to be further indicative of the fact that the appellant is not a lesbian as claimed by her. The appellant has not had any relationships since she has been in the UK.
31. I acknowledge that the appellant has produced an expert report in support of her claim, but this accepts her credibility at face value and the writer did not interview the appellant and I find that it is of limited value.
32. The appellant has produced a letter from Hoops and Loops in support of her claim. It indicates that the appellant has participated in groups and discussed her sexuality. The appellant however is an intelligent woman who attended university in Albania and spoke English before me. I find the fact that the appellant participated in such groups and spoke about her claimed sexuality to an individual within those groups does not significantly advance the appellant's asylum claim.
33. The appellant came to the UK illegally despite being married to a British citizen. She has not satisfactorily explained why she took such action. She did not approach the authorities until she was apprehended by immigration officers. I find the appellants actions to be extremely damaging to her credibility and indicative of the fact that the appellant's motivation was to come to the UK by any means and has little regard for the immigration laws of this country. I find this to be indicative of the fact that the appellant after being arrested and detained and following her screening interview, received advice and raised a late fabricated claim for asylum based on sexuality. I find the appellant to be totally lacking in credibility.
34. As indicated above, the appellant came to the UK illegally and failed to claim political asylum until apprehended by immigration officers and having regard to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, I find that the appellant's immigration history significantly damages her credibility."

14. Then at paras 36-37 the judge continued and reached his adverse conclusion as follows:

"36. There are further discrepancies in the appellant's evidence and evidence which I find to be implausible but which I will not set out in further detail herein. I conclude that the appellant has fabricated her asylum claim in its entirety and find her to be lacking in credibility.

37. In the light of the inconsistent, vague and implausible account provided by the appellant which is lacking in cohesive detail, I find that the appellant has not demonstrated that she is part of a particular social group and/or that she would face persecution at the hands of her family members or society upon return to Albania or based upon her sexuality that she has a well-founded fear of persecution. I find that the appellant's asylum claim is bound to fail. I do not find that the appellant will be returning to Albania as a lone single woman and find that she is in contact with her family members."

Discussion

15. As I have already indicated, Ms Solanki made a number of points under Ground 1.
16. First, she submitted that the judge had failed to take into account, in assessing the appellant's credibility, that the Secretary of State had accepted in para 26 of the refusal letter that she had given a consistent account regarding her marriage to "D" and the effects of this on her relationship with her family in Albania and so had accepted that aspect of her claim.
17. Whilst the judge made no reference to the respondent's acceptance of this part of her claim, the judge no doubt had fully in mind the position of both the appellant and respondent at the hearing. In itself, the judge's failure to refer to this, if his other reasons for disbelieving the appellant are sustainable, would not amount to a material error in his reasoning.
18. However, there are a number of difficulties with the judge's reasoning.
19. Secondly, Ms Solanki submitted that the judge had been wrong to take into account that the appellant had not disclosed her claim based upon her sexuality either at her 'mitigating circumstances' interview on 22 March 2017 nor in her screening interview on 8 May 2017. She pointed out that the appellant had set out the basis of her claim in her substantive asylum interview on 9 May 2017 and the judge had failed to take into account that at her screening interview she had said at section 4.2 that she would prefer "a woman" when specifically asked whether she had a preference for being interviewed by a man or woman. Ms Solanki also submitted that the appellant explained in her evidence why she did not disclose her sexuality and basis of her claim earlier.
20. Thirdly, Ms Solanki submitted that the judge was wrong in para 30 to take into account that the appellant had not attended "LGBT groups and clubs" despite living in London and had not had any relationships since she was in the UK. Further, Ms Solanki submitted that, by contrast, the judge criticised the appellant in para 32 for having subsequently "participated in groups and discussed her sexuality".

21. Mr Howells accepted that the judge had been wrong to take into account her lack of involvement with LGBT groups and clubs and not to have formed any gay relationships in the UK.
22. Fourthly, Ms Solanki submitted that the judge had been wrong to disregard the expert's report in para 31 on the basis that the expert had accepted the appellant's "credibility at face value". She submitted that the expert had not done so but, in contrast, had identified important aspects of the appellant's account as being plausible in the light of his expert knowledge.
23. Dr Tahiraj's report is referred to by the judge at para 14 as follows:

"Additionally provided to me was an expert report from Doctor Tahiraj who finds that the appellant's testimony is coherent and a common story of a daughter brought up under Kanun and coerced to marry despite being a lesbian. The family comes from a traditional area where Kanun law is still practised. The appellant would be at risk from her family members upon return. LGBT people face significant barriers in openly practising their sexuality human rights in Albania. Implementation of the law is problematic. The appellant would be at risk upon return."
24. Mr Howells acknowledged that perhaps the judge could have given fuller consideration to the report than the brief statement in para 31 that it was of "limited value" because it accepted the appellant's account at face value and that the expert had not interviewed the appellant. During the course of his submissions, however, Mr Howells accepted that the judge had been wrong, in effect, to reject the expert report on the basis that the expert's reasoning was based upon an acceptance of the credibility of the appellant's account. He accepted, in response to my enquiry, that the report raised relevant matters to the appellant's credibility arising out of the expert's opinion that aspects of her account were plausible.
25. Fifthly, Ms Solanki submitted that the judge had failed to properly consider the evidence, and in particular that of the appellant, why she had come to the UK illegally despite being married to a British citizen. In para 53 of her witness statement, Ms Solanki submitted, she had explained that "D" and her father made arrangements for her to come to the UK illegally where she lived with "D" and his son.
26. Sixthly, Ms Solanki submitted that the judge had simply been wrong in para 34 of his determination to apply s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to the appellant on the basis that she had failed to make her asylum claim before she was "apprehended by immigration officers". Ms Solanki submitted, and Mr Howells accepted in his submissions, that s.8(6) of the 2004 Act could not apply as the appellant had sought to claim asylum prior to her being arrested even though she had been unsuccessful in doing so.
27. Finally, Ms Solanki submitted that the judge had erred by failing to consider large parts of the appellant's account. He had failed to give consideration to her account of the emergence of her sexual identity and claimed gay relationship in Albania (beginning at para 7 of her witness

statement); he failed to assess her evidence concerning why she did not disclose her sexuality (see pages 6 to 9 of her witness statement). Ms Solanki also submitted that the judge had failed to consider the GP's report and the Rule 35 report in assessing her credibility.

28. Whilst I do not accept all the points raised by Ms Solanki, I do accept a significant number of them such that I am satisfied that the judge's adverse credibility finding is flawed.
29. First, I accept, as indeed Mr Howells conceded, that the judge was wrong to doubt the appellant's claimed sexuality on the basis of her failure to take part in "LGBT groups and clubs" in London and not to have formed any gay relationships since being in the UK. The danger of relying upon reasoning based upon "stereotyped notions" was recognised by the CJEU in the case of A, B and C v Staatssecretaris van Veiligheid en Justitie (Case C-148/13 to C-150/13) [2015] Imm AR 403 especially at [59]-[63]). The fact that an individual does not overtly engage in social activities focused upon persons of their own sexual orientation or, indeed, form a sexual relationship with a person of the same sex is not a safe indication, one way or another, of their sexuality.
30. In addition, when the appellant had subsequently "participated in groups and discussed her sexuality", the judge counted this against her in para 32 of his determination; in the sense that having done so he concluded that it did "not significantly advance the appellant's asylum claim". There is a very real sense in which the judge approached the appellant's behaviour on the basis that she was 'damned if she did and damned if she didn't'.
31. Secondly, the judge was wrong to disregard the expert report - which is, in effect, what he did by giving it "little weight" - on the basis that the expert had not interviewed the appellant and his conclusions were based upon accepting her credibility. As a reading of the expert report makes plain, and the judge's brief summation of it at para 14 sets out, the expert identified a number of aspects of the appellant's claim which were plausible given his expert knowledge of Albania. Those opinions were relevant and, although not determinative, could not simply be disregarded in assessing the credibility of the appellant's account. The fact that the appellant had not been interviewed did not affect the expert's opinion on these issues. It was not justifiable to conclude that he had, in effect, reached the view on the basis of accepting the appellant's credibility.
32. Thirdly, as Mr Howells accepted, the judge was in error in para 34 in applying s.8 (in all probability s.8(6)) of the 2004 Act. The appellant had not claimed asylum only after she had been "apprehended" by Immigration Officers. It was accepted before the judge by the Presenting Officer that she had sought to claim asylum prior to being arrested and subject to her 'mitigating circumstances' interview. The judge was, therefore, wrong to take into account that aspect of the appellant's "behaviour" as "damaging" of her credibility under s.8 of the 2004 Act.
33. In addition, I have considerable misgivings about the judge's treatment of the appellant's failure to disclose her sexuality (and the basis of her

asylum claim) prior to her asylum interview. There are very real dangers in treating the failure to disclose a claim in a screening interview as a reliable basis for doubting the veracity of a subsequently made claim, especially when that claim is disclosed shortly afterwards (here it was one day later) in a substantive asylum interview. Particular caution needs to be exercised in a case, such as the present, where an individual may be required to disclose sensitive matters about their private or sexual life (see A, B, C at [64]-[65])). Here, at least, the judge should have had regard to the fact that even in her screening interview the appellant said she would prefer to be interviewed by a “woman” interviewer. That should, at least, raise the potential exculpatory argument that she did not disclose personal aspects of her life for understandable (and good) reasons. The judge did not engage with the evidence that was relied upon before him relevant to that latter issue.

34. Finally, in relation to the final points raised by Ms Solanki in her submissions, the judge’s reasoning at paras 26–34 and 36–37, makes no reference to those aspects of her account concerning her sexual relationship in Albania and her evidence concerning the emergence of her understanding of her own sexuality. These were, in effect, “core” parts of her claim. The judge was clearly aware of this evidence but made no reference to it, nor did he make any assessment of it, in his reasons and in reaching his adverse credibility finding. That was, in addition to the points I have identified above, a further error in his determination.
35. It is unnecessary for me to deal, in any detail, with the remainder of Ms Solanki’s submissions. Suffice it for me to say that I would not accept that the judge failed in any material way to take into account the GP’s letter or the Rule 35 report. However, for the reasons I have given above, the judge’s assessment of the appellant’s credibility entailed a number of errors which cumulatively materially affected his conclusion. That conclusion is, therefore, legally flawed and must be set aside.
36. As Ground 1 is made out, it was accepted that the judge’s decision could not stand as Ground 2 was conceded by Mr Howells. Finally, it was common ground that the Art 8 decision could not stand if Grounds 1 and 2 were established.

Decision

37. Thus, the decision of the First-tier Tribunal to dismiss the appellant’s appeal involved the making of a material error of law. That decision cannot stand and is set aside.
38. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President’s Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* re-hearing before a judge other than Judge Cohen.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", with a horizontal line underneath.

A Grubb
Judge of the Upper Tribunal

18 January 2019