



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04949/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34

Decision & Reasons Promulgated
On 5 August 2020

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

AMINE ETTAKAFFOULI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS (P)

1. The appellant currently identifies himself as a citizen of Morocco, born on 9 January 1977. He has previously asserted that he is Iraqi and that he is Italian. He first came to the attention of the respondent in October 2002. Various proceedings have been exhausted since that date. He made further submissions on 2 April 2019, refused by the respondent on 2 May 2019. FtT Judge O'Hagan dismissed his appeal by a decision promulgated on 1 August 2019.
2. By an application dated 13 August 2019, the appellant sought permission to appeal to the UT. His grounds are directed against this part of the FtT's decision:

[31] ... if the appellant's claim ... based on his sexuality was genuine, there is a reasonable degree of likelihood that he would have informed his ... representatives prior to

May 2016 ... within ... a confidential environment, and in absence of members of the Arab Muslim community, such as a solicitor's office. If he did not have legal representation ... he would have told the respondent ... within the confidential environment of an interview room ... [he] has very good command of the English language and would not ... require an interpreter to disclose this material fact.

[32] I do not find credible the reasons ... given for delay. I do not accept the appellant's evidence for failing to disclose sooner that he is a gay man.

3. The grounds say that although the Judge narrated the correct approach, at [31] she "discloses" her "actual approach", and that although "clumsily worded" she meant that even if unrepresented the appellant would have disclosed his sexuality to the SSHD earlier than he did. The grounds continue:

In both those respects the Judge inverted the standard of proof. The judge should not have asked whether there was a reasonable degree of likelihood that the appellant would have disclosed his sexuality ... but should have assessed whether there was no realistic prospect that he would have disclosed his sexuality earlier ... These errors fundamentally undermine the decision. It cannot be known what conclusion would have been reached had the Judge applied the correct standard.

4. FtT Judge Swaney granted permission on 30 August 2019. She said that the Judge had correctly applied the lower standard of proof, and the grounds were not arguable, but there was an obvious point, although not in the grounds:

The judge notes the appellant's evidence about ... same sex relationships and ... having openly attended gay bars in the UK ... The judge refers to paragraph 339L of the rules ... but does not make any explicit finding as to whether ... corroborative evidence is necessary or engage with any reasons why it might not be available ... particularly given the lapse of time ... since ... relationships in Morocco and Greece. The judge arguably finds the appellant incredible ... based on her finding that his explanation for failing to disclose ... earlier ... was not reasonable rather than ... being one factor in an assessment ... in the round.

5. On 3 April 2020, the UT issued directions with a view to deciding without a hearing whether the FtT erred in law and, if so, whether its decision should be set aside. Parties were also given the opportunity to submit on whether there should be a hearing.

6. The appellant's response dated 16 April 2020 is along these lines:

- (i) At [1] - [5], he "seeks to vary the grounds ... upon which permission has been granted" to include the original grounds in the application.
- (ii) On the point on which permission was granted, he founds upon the lapse of 23 years since the appellant was in Morocco, and 17 years since he was in Greece; and submits that the Judge "isolated a negative aspect" and determined the appeal on that, rather than on a rounded assessment.
- (iii) A rehearing in the FtT is sought.

7. In a response dated 20 April 2020, the SSHD submits:
 - (i) The FtT was entitled to attach weight to 14 years delay in claiming to be gay, a fraudulent claim as an Iraqi national, and failure of a previous claim based on private life.
 - (ii) The determination in 2015 that the appellant was not credible, and was an economic migrant, was the starting point. The appellant made no claim to be gay in that appeal.
 - (iii) The judge at [29] noted that delay was not in itself fatal.
 - (iv) The judge accepted that cultural norms and the appellant's community might lead to secrecy, but it was open to her to find that he had opportunities to disclose outside that context.
 - (v) The appellant might have been unable to provide evidence of relationships before he came to the UK, but he provided no evidence of claimed relationships here, or of attending gay bars.
 - (vi) Even if it had been accepted that the appellant is gay, his discretion was such that he would not be at risk.
8. The appellant's further submissions add the following:
 - (i) The grant of permission by the FtT denied him the opportunity to advance his original grounds. They should be considered by the UT.
 - (ii) The respondent appears to accept that it would have been difficult to bring evidence of historic relationships. That shows the overall findings to be defective.
 - (iii) The threshold for error not to be material is high, "... of great rarity".
 - (iv) The respondent's point about behaving with discretion is novel, and would have to be assessed afresh in the FtT.
9. Neither party has suggested that a hearing is necessary. Consistently with rules 2 and 34, the UT may now decide, based on all submissions received, whether the FtT erred in law and, if so, whether its decision should be set aside.
10. The next question is which grounds may properly be advanced.
11. The appellant's approach to renewing the original grounds is procedurally misconceived. The correct course, where the FtT grants permission on certain grounds but refuses on others, is to apply to the UT for permission under rule 21(2).
12. If an application for permission on those grounds was before me, I would not find them to be arguable.

13. The term “inversion” in the grounds is odd. A judge might invert the *burden* of proof, by putting it on the wrong party, but not the *standard* of proof.
14. If the grounds are intended to convey that the FtT reversed the burden of proof, there is nothing in the decision to show that it might have thought the SSHD, rather than the appellant, had to establish the case.
15. In trying to specify the error, the grounds say that the FtT “should not have asked whether there was a reasonable degree of likelihood that the appellant would have disclosed his sexuality ... but should have assessed whether there was no realistic prospect that he would have disclosed his sexuality earlier”. I find this difficult to follow. If anything, it seems to suggest that the FtT should have put the appellant to a higher test.
16. The FtT directed itself at [22 - 23] on the lower standard of proof and expressed its conclusions in those terms at [34, 35, 36 & 37].
17. The original grounds identify no error on a point of law in the decision. If permission had been granted on those grounds, I would not have upheld them.
18. The point on which permission was granted is that the FtT should arguably have considered whether corroboration might reasonably have been forthcoming.
19. All the judge said at [28] is that in absence of evidence to corroborate that the appellant is homosexual, she was “cognisant of paragraph 339L of the rules”. That paragraph provides:

It is the duty of the person to substantiate the asylum claim or establish that they are a person eligible for humanitarian protection or substantiate their human rights claim. Where aspects of the person’s statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

- (i) the person has made a genuine effort to substantiate their asylum claim or establish that they are a person eligible for humanitarian protection or substantiate their human rights claim;
- (ii) all material factors at the person’s disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;
- (iii) the person’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person’s case;
- (iv) the person has made an asylum claim or sought to establish that they are a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and
- (v) the general credibility of the person has been established.

20. The Judge did not, in the terms of the grant of permission, “make any explicit finding as to whether ... corroborative evidence is necessary”; but she was not required to, and it would have been odd if she did. The

question whether corroboration is generally required was not her for answer. It is not required; every judge should know it; and they do not have to say it in every decision. A general self-reminder of the terms of paragraph 339L may be rather pointless, but it is not an error of law.

21. In taking up and developing this ground, the appellant now points to the possible difficulty of corroborating gay relationships from long ago; that may be well be, but if he thought it needed explicit rehearsal, he might have argued it to the FtT.
22. The difficulty of proving long ago matters does not help him over his life in the UK in more recent years. He has referred vaguely to keeping secrets from his own community, but going to gay bars is a matter which would naturally fall for proof from other quarters.
23. It is difficult to see that more detailed consideration of paragraph 339L might have advanced the appellant's position. Application of its sub-paragraphs to his history more obviously tends against him.
24. The decision is not based only on absence of corroboration and delay in disclosure. The judge directed herself at [28] and [29] that such matters were not necessarily decisive. Previous adverse findings, applying *Devaseelan*, were also significant. The eventual assessment was in the round.
25. Had I resolved the grounds otherwise, I would not have upheld the decision on the alternative basis that the appellant would behave discreetly from choice, not from fear of persecution, and so would not be at risk. The SSHD did not raise that with any clarity in the refusal letter, and it is not recorded as part of submissions. However, as the negative credibility finding stands, the issue is immaterial.
26. The decision of the First-tier Tribunal shall stand.
27. No anonymity direction has been requested or made.
28. The date of this determination is to be taken as the date it is issued to parties.

Hugh Macleman

UT Judge Macleman Date: 27/7/2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email.