



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

Appeal Numbers: PA/00164/2021
UI-2022-000652

THE IMMIGRATION ACTS

**Heard at Field House
On 31st May 2022**

**Decision & Reasons Promulgated
On 2nd August 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MR S U D
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ahluwalia, instructed by Tower Hamlets Law Centre
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Pakistan born on 8th May 1992, appeals against a decision of First-tier Tribunal Judge Bartlett, who dismissed the appeal against the refusal on 4th December 2020 by the Secretary of State of the appellants' asylum and humanitarian protection claim on the basis that he is bisexual and feared return to Pakistan.
2. The grounds submitted that the sole issue under appeal was whether the appellant was indeed bisexual, and the credibility of the appellant was in issue. It was conceded by the respondent at the hearing that if the

appellant were bisexual, he would be at risk of persecution if he were to live openly as a bisexual man.

3. The principal ground of appeal was that the judge came to conclusions and had made adverse credibility findings on the basis of matters that were not put to the appellant during the course of the appeal. The judge's principal findings that the appellant was not credible are to be found in [13], [14] and [15].
4. It was recognised that fairness did not require that every point that may be decided against an appellant should first be put to him and whether this was necessary depended on the circumstances of the case, see **R (on the application of Maheshwaran) v Secretary of State for the Home Department [2002] EWCA Civ 173**. It depended on the matter's importance. This was context-dependent, but making findings "against an appellant when the subject matter of those findings was not put to the appellant is likely to amount to an error of law as a matter of fairness".
5. It was noted that the Tribunal may ask questions intended to seek an explanation for inconsistencies and to clarify issues, even if they have not been raised in the refusal letter, but in the present case the judge did not ask any follow-up questions of any of the three witnesses who attended.
 - (a) At [13(i)] the judgment was hard to follow. A level of detail in one answer did not mean that another answer to a different question that had less detail lacked credibility.
 - (b) In relation to [13(ii)], that was not material to the issue before the Tribunal, i.e. that a lack of interest in females would not have been commented on by his friends or siblings. Even if the judge found this aspect of the appellant's evidence difficult to accept, a finding on one aspect of his case should not by itself have been enough to result in overall credibility being damaged such that he was not believed about his sexuality.
 - (c) [13(iii)] is not clearly explained. The appellant had explained in his written evidence that he had left Saudi Arabia after his work visa expired and went to the UK initially on a visit visa and living in secrecy in Saudi Arabia was consistent with his claim of fear in Pakistan.
 - (d) The judge's finding at [13(iv)] should have been put to the appellant in questioning and this was not an issue contended by the Home Office in the refusal letter. Here the judge found it not credible that the appellant went from having absolutely no interest whatsoever in females to having gay relationships and then suddenly moving in with a woman and intending to marry her.
 - (e) The line in [13(v)] about the extent of knowledge of the UK asylum processes amongst the Asian community was troubling and prejudicial

and this is a matter that should have been put to the appellant or the two supporting witnesses.

- (f) At [14] the judge “makes no comment” on the witnesses’ sexuality but nevertheless decides that their evidence does not outweigh the other findings made against the appellant. This amounted to inadequate reasoning.
- (g) In particular, it was significant that at [15] the judge called into question the veracity of the photographs submitted by the appellant, when at no point in the hearing was the appellant questioned about the photographs. Indeed, even in the refusal letter the Home Office did not suggest that they were staged (see [51] of the refusal letter).

The Hearing

6. At the hearing Mr Ahluwalia submitted that it was the judge’s approach to credibility and the reasoning adopted, or rather lack of reasoning, which undermined the decision. He relied on the written grounds as rehearsed above. He submitted that [13] was defective for lack of reasoning. I observed that it was clear from the reasons for refusal letter that the appellant’s claim to be gay and thus bisexual was rejected and that was the context in which the hearing was framed. Mr Ahluwalia submitted that reading [41] to [49] of the reasons for refusal letter, there was a confused position from the Secretary of State and thus all the more reason to clarify. He submitted that [13(v)] was a broadly prejudicial statement and not supported by the evidence and not one adopted by the reasons for refusal letter. If all the judge had said was that she disbelieved that the appellant had had a conversation with former partners, that would have been acceptable, but the later statements undermined the whole of that paragraph.
7. At [14] there was no finding about the witnesses, merely that there was no comment on their sexuality but that the evidence did not outweigh the other evidence and that paragraph was flawed in its reasoning.
8. The reasons for refusal letter raised at [51] the question of the photographs and that it was not possible to establish the context and Mr Ahluwalia accepted it was broadly written but he submitted that the only questions at the hearing which were in relation to the witnesses about the photographs were when the Home Office Presenting Officer asked when they were taken. It was not put that they may have been staged and if the judge formed the view that he was not credible she should have made mention of the photographs and asked about them. If it was alleged, they were staged, that was a very serious allegation because it was a criminal offence to fabricate evidence and therefore very important to establish that. There were a number of findings which were not put to the judge and the photographs was one of them.

9. Mr Melvin submitted that the issues before the judge were very clear. The judge set out the cross-examination and the attack on the adverse credibility findings was no more than just that. The judge was entitled to make the findings she did on the points. In relation to [13(i)], the appellant clearly changed his mind on numerous occasions and the judge did not find the explanations credible. The judge's findings were reasoned and open to her and it was clear she had read the screening interview and the asylum interview. In relation to [13(v)] and the knowledge of asylum in the Asian community, it was clear in the reasons for refusal letter and submissions that the appellant's witnesses who claimed to have been in long-term relationships were asylum seeker themselves and that was a point that was raised before the judge. It was a matter of context and should be read within context. It also should be noted that in 2018 the appellant would have been fully aware that he had no leave to remain in the United Kingdom.
10. In relation to the photographs, the reasons for refusal letter did take issue with the photographs and it is clear that the sexuality and gay sexuality was rejected. It was clear that thus the photographs were not accepted. Taking all of the points into account, the judge heard the evidence and looked at the reasons for refusal and reached conclusions that were open to her on the evidence and the decision should be upheld.
11. It was agreed between the representatives that the appellant sent the photographs to the Home Office five days after the interview. The appellant was asked about documentation at the interview itself.

Analysis

12. I set out **AM (fair hearing) Sudan [2015] UKUT 00656** at [7(v)]:

"7. We would emphasise that, fundamentally, each of the grounds of appeal is, properly, to be viewed and evaluated through the prism of each party's inalienable right to a fair hearing. Bearing in mind the context of this appeal, it is appropriate to formulate some general rules, or principles. It is important to emphasise that these are general in nature, given the unavoidable contextual and fact sensitive nature of every case.

...

(v) If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the 'audi alteram partem' duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in Secretary for the Home Department v Maheshwaran [2002] EWCA Civ 173, at [3] -

[5] especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any lis inter-partes."

13. Further, in **Secretary for the Home Department v Maheshwaran [2002] EWCA Civ 173** it was acknowledged that Adjudicators cannot be expected to be alive to every possible nuance of a case before the oral hearing and in general reserve their decisions for later delivery and will ponder on what has been said. Specifically at [5], Lord Justice Schiemann stated this:

"5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

As stated at [6] of **Maheshwaran**: "The requirements of fairness are very much conditioned by the facts of each case."

14. It is the appellant who has applied for asylum, and he must prove his case. The context is specifically important in this case, and I have read carefully the reasons for refusal letter and the asylum interview. The reasons for refusal letter at [40] clearly sets out: "You claim that you are gay. I do not accept that it is reasonably likely for the reasons given below" and at [41]: "You initially claimed during your screening interview that you are gay, which is a man only attracted to other men (SCR, 4.1). However, during your asylum interview you stated that you are bisexual (AIR, 51), which is a man attracted to both sexes."
15. The appellant's sexual orientation was explored during the asylum interview, and it was clear from the letter that it was rejected that he was gay (and thus bisexual).

16. On reading the asylum interview, it is very clear that there was a sharp inconsistency between the appellant's answer at question 156 when he was specifically asked whether he had any relationships with men in the United Kingdom and he responded "no" and that of question 214 when he stated by direct contrast, " I did have a sexual relationship with men" and his explanation at 215, to which the judge alluded at [13(i)]. The appellant maintained that he "took it when you asked me if I was in a relationship whether I was living with them or had any intention of marrying them, I was having sex with guys". There was a very clear change in the appellant's position in relation to his sexual relations with men, which was axiomatic, and it was open to the judge to identify that, particularly in the context of his later responses at question 220 where the appellant specifically stated the relationships that he had had with men. Although the judge only cited one contradiction in the interview, on reading the interview as a whole, it was quite clear that the appellant had departed from his original explanation.
17. Turning to [13(ii)], again, the judge was entitled on the evidence to reject the appellant's credibility in part on the basis that neither his friends nor his family ever asked him about his lack of relationships, given that he was in Pakistan, and he was 24 years old. That is not insufficiently reasoned and a clear and logical deduction, particularly in the context of the responses given by the appellant during his asylum interview, for example at question 196 that his family were forcing him to get married, which he did not want to.
18. Again, [13(iii)] is clearly explained. It was open to the judge to take an adverse inference from the appellant's response that he was content to carry on living in Saudi Arabia for the rest of his life albeit that he could not live openly as a gay person, and bearing in mind that he had been forced to leave because his work visa had expired, it is not illogical to find it did not sit well with his claim to be gay.
19. The criticism of the judge at [13(iv)] was that the fact of going from non interest in females until he met Bianca, should have been specifically put to the appellant in questioning. The appellant, however, was fully aware of the contents of the reasons for refusal, his answers that he had given during his asylum interview and his own evidence. He was legally represented. He was fully aware that he had maintained that he had no interest in females whatsoever until he had come to the UK and met Bianca. The point was obvious. Again, it was open to the judge to find that there was absolutely no interest in females at all in Pakistan and that

"Whilst everybody's sexuality is unique to them I do not find it credible that the appellant went from having absolutely no interest whatsoever in females in any way to having gay relationships and then quite suddenly moving in with a woman (evidence was that he moved in with her one month after meeting her) and intending to marry her."

20. The appellant's evidence that that had been the case and the timeline was clear and obvious on the papers and it was open to the appellant to explain that.
21. Turning to the criticism at [13(v)], it is unfortunate that the judge made a remark that "the grounds for claiming asylum are well known in Asian communities in the United Kingdom" but that remark does not undermine the remainder of the paragraph, which is that the appellant's claim that he did not know about claiming asylum in the United Kingdom lacked credibility. This was because on his own account he had been going to gay clubs and meeting men of Asian backgrounds some months before he claimed asylum and indeed, the judge stated that given that the appellant had no leave to remain and no family support, it was not credible that he did not discuss these matters with friends of an Asian background, particularly as his witness statement and photos all describe men of Asian background. As stated, the point made is that his witnesses themselves had claimed asylum on the basis that the countries to which they would be returned would forbid them from being openly gay. In that context it was open to the judge to make the findings that she did.
22. Additionally, in relation to [14], I find this criticism cannot be sustained in the light of the other cumulative credibility findings that have been upheld. As the judge stated, one of the witnesses did not attend to support his witness statement. The judge referred to the witness evidence of the witnesses when she rejected their evidence, and it was noted that both of them met the appellant after he had claimed asylum. In the light of the previous findings it was open to the judge, who clearly took into account the witness evidence, to reject that it outweighed the issues within the appellant's credibility. As the judge stated she did not know the details of their asylum claims.
23. Turning to the photographs, as Mr Ahluwalia accepted, the reasons for refusal letter stated at [51] that "it is not possible to establish the context in which these photographs were taken, or to establish your relationships with any of the other men in them". It is clear that at least one of the witnesses had not seen the photographs and the judge placed no reliability on the photographs. Again, it was open to the judge, given the issues on credibility were rejected, to find that she was not satisfied that the photographs had not been "staged to some extent for the purposes of this appeal". Mr Ahluwalia stated this was a very serious allegation and that the appellant was fabricating evidence but in effect, the judge was merely stating that the evidence did not satisfy the burden of proof, albeit low, which rested upon the appellant.
24. It is clear that the reasons for refusal letter did take issue with the photographs. The refusal letter stated, 'As it is not possible to establish the context in which these photographs were taken or to establish your relationships with any of the other men in them when considered in the round little weight has been placed on these in support of your claim to be bisexual'. Evidently the judge too placed little weight on the photographs.

25. Overall, the Upper Tribunal has been cautioned to be slow in undermining the findings of the First-tier Tribunal, because of disagreement_and this is one such case. As set out in **AE (Iraq) v Secretary of State** [2021] EWCA Civ 948 by Laing LJ

32. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted. As Baroness Hale put it in SSHD v AH (Sudan) [2007] UKHL 49 [30]:-

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

33. And as Floyd LJ said in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 [19]:

"... although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter."

26. I do not find the reasoning of the First-tier Tribunal to be inadequate or that matters were not put to the appellant when they should have been. In the light of **AM (Sudan)** and **Maheshwaran**, the appellant must have been aware of the contradictions in his evidence, was legally represented and it is for him to prove his case (albeit to the lower standard). Judges do not have to put every single point or every nuances to an appellant particularly when, as here, the main criticisms of the case were evident from the reasons for refusal letter and asylum interview. There was no procedural irregularity in the judge's approach and reasoning.

27. I find no error of law in the First-tier Tribunal and the decision will stand. The appellant's appeal remains dismissed.

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 Helen Rimington

Date 16th June 2022

Upper Tribunal Judge Rimington