



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003770
First-tier Tribunal No: PA/52775/2021
IA/07641/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

AH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Miah, instructed by Law Valley Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 29 November 2022

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 5 October 1988. On 11 February 2020 he applied for asylum on the basis of being gay and facing a risk from both family and fundamentalists in Bangladesh. On 26 May 2021 the application was

refused. Amongst other things, the respondent did not accept that the appellant is gay.

2. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Hussain (“the judge”). Following a hearing on 5 April 2022 the judge dismissed the appeal. The appellant now appeals against that decision.

The Appellant’s Claim

3. The appellant’s claim, in summary, is that as a young child (aged 10) he formed a close relationship with another boy, Rakib, with whom he subsequently (aged 15) began having a physical relationship. He claims that, when he was 19 years old, he was seen in an “intimate position” with Rakib by an uncle; following which his father, in front of the family, beat him severely.
4. He claims that soon after the beating his father sent him to Dubai where he lived for over a decade. He claims to have returned in 2019 to Bangladesh where his parents were insisting he go through with a marriage; but he refused and instead returned to Dubai. He claims that he moved to the UK from Dubai because he wants to live in an environment where he can express his sexuality openly.

Decision of the First-tier Tribunal

5. The judge did not believe the appellant. In paragraph 46 he described the appellant’s claim as “opportunistic”. The judge gave multiple reasons for not believing the appellant. These include:
 - (a) The judge found that the appellant has been inconsistent about the length of relationship with Rakib (paragraph 38).
 - (b) The judge considered that it made “no sense” that the appellant claimed to realise he was gay aged 15 when he had been intimate on at least two occasions prior to this (paragraph 39). The judge stated:

Whilst I appreciate that the relationship with Rakib could have started as a friendship, which later turned intimate, it simply makes no sense for the appellant to suddenly realise at the age of 15 that he was gay, having according to his oral evidence, at least twice become intimate with Rakib before then.

- (c) The judge found that the appellant was not clear as to whether his relationship with Rakib was “simply of the two men having sex” or one with emotional attachment that “one would expect in a heterosexual relationship”(paragraph 39). The wording used by the judge is as follows:

It is not at all clear to me whether the appellant’s position is that he was in a relationship (with emotional and physical attachment one would expect in a heterosexual relationship) or it was a case simply of the two men having sex.

- (d) The judge considered it to be implausible that the appellant’s father would “have been so foolish” as to beat the appellant and then complain about being dishonest (paragraph 40). The judge stated as follows:

The appellant's father could not have been so foolish on the one hand to inflict such punishment on his son, as will go public and then complain of being dishonoured by his son being a gay person.

- (e) The judge found it highly unlikely that the appellant's sexual orientation would be discovered by the community at one time if he had been gay (paragraph 40). The judge stated:

I also find it highly unlikely that the appellant's orientation would suddenly be discovered by the whole community when he claimed that he had been gay all along.

- (f) The judge considered to be unclear how the appellant's father managed to send him so quickly to Dubai (paragraph 40). The judge stated:

It is also unclear how it is that the appellant's father managed to send him to Dubai so soon after finding the appellant in an intimate act.

- (g) The judge found that despite the restrictive laws in that country" (paragraph 41). The judge stated:

He claimed that he lived in Dubai for 12 years, where he suppressed his sexuality. I find it implausible that if the appellant was gay in orientation that he would not have attempted to have either a durable relationship or at least some sort of gay experience, whilst I appreciate that he would not have wanted to go public because of the restrictive laws that prevail in Dubai.

- (h) The judge found it "entirely unbelievable" that he heard from a friend in the UK that people live openly gay when he did not reveal whether his friend is gay and that it was "implausible" that a non-gay friend took him to gay bars (paragraph 42). The judge used the following wording:

He said that having heard from his friend that people were able to be openly gay in the United Kingdom attracted him to come here to check things out. However, he does not reveal that his friend is a homosexual, which raises serious doubts in my mind as to whether he would have revealed to his friend that he is in fact gay himself and wishes to migrate to a country where this was openly permissible. His claim that as a visitor, his friend took him around gay clubs is equally implausible, given no mention is made of his friend's sexual orientation.

- (i) The judge found that it did not make sense that the appellant went to clubs and bars alone. She stated in paragraph 44:

What possible enjoyment could he get from frequenting these places simply on his own

Grounds and Submissions

6. The grounds are not clearly structured and are difficult to follow. However, it is tolerably clear that (although not put in these terms) this is a rationality challenge; that is, the appellant contends that (at least some of) the reasons given by the judge for not accepting that he is gay are perverse. Mr Miah put it

the following way in his oral submissions: he submitted that the adverse credibility findings are unsustainable and unsafe.

7. Mr Melvin, building on the rule 24 response, argued that this is merely a merit-based disagreement with reasoning that was not perverse and that the findings were open to the judge. The rule 24 response refers to the recent Court of Appeal decision *Volpi & Anor v Volpi* [2022] EWCA Civ 464 where it is emphasised that an appeal court should not interfere with conclusions on primary facts unless the judge was “plainly wrong” and that a decision should not be set aside on the basis of failure to give a balanced consideration to the evidence unless it was “rationally insupportable”.

Analysis

8. To succeed in this appeal, the appellant has a high hurdle to overcome. He must establish that the (or at least some of) the judge’s reasons for not accepting he is gay are not rationally supportable; or, as put in paragraph 48 of *SB (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 160, he must show that this is a case where:

“the inference drawn from a fact found is logically not one that properly can be drawn”

9. In my view, several of the reasons given by the judge for not believing the appellant is gay are based on inferences that logically cannot properly be drawn and are not rationally supportable. They are as follows:

The finding in paragraph 39 that it “simply makes no sense” that the appellant realised he was gay aged 15 when he engaged in intimacy on at least two previous occasions

10. It is, in my view, not surprising that a teenager would have several physical experiences with another young person before coming to the realisation that he is gay. I am unable to understand why the judge considered that this makes no sense. Accordingly, I do not consider that it was rationally open to the judge to conclude that it made no sense that the appellant had at least two sexual experiences before realising he was gay.

The distinction drawn in paragraph 39 between “a case simply of the two men having sex” and “a relationship (with the emotional and physical attachment one would expect in a heterosexual relationship)”

11. I am unable to understand the relevance of the distinction the judge appears to be drawing in this paragraph as if either of the alternatives posed by the judge is true that would be an equally strong indication that the appellant is gay.
12. I would add that this finding is further undermined by the judge appearing to suggest that emotional and physical attachment is a characteristic of a heterosexual rather than gay relationship. That is plainly not the case, and the impression (even if it was not intended) given by this passage is undermining of the decision.

The finding in paragraph 41 that it is “implausible” that the appellant would not have attempted to have a durable relationship or a “gay experience” whilst living in Dubai even though there are restrictive laws

13. It is unlawful for a man to have sex with another man in Dubai. In these circumstances, I do not accept that it was rationally open to the judge to find it “implausible” that the appellant did not have had same sex encounters or relationships whilst in Dubai.

The finding in paragraph 42 that it is implausible that a non-gay friend took the appellant to gay bars and explained to him that in the UK people are openly gay

14. The reasoning of the judge in paragraph 42 is unclear. On one reading, the judge is stating that the appellant’s credibility is undermined by failing to reveal if his friend is homosexual. This is a finding that would be open to the judge. However, paragraph 42 also appears to be saying that it is implausible that a person who is not gay would take the appellant to gay clubs and explain to him that the UK is a welcoming place for gay men. In my view, this is not a rationally supportable finding as there is nothing, on any legitimate view, implausible about a non-gay person taking a gay friend visiting the UK to gay bars and telling him about gay life in the UK.

The finding in paragraph 44 that it makes no sense for the appellant to go to clubs/bars on his own and the comment: “what possible enjoyment could he get from frequenting these places simply on his own?”

15. In paragraph 44 the judge gave a clear and sustainable reason for not accepting that the appellant goes to gay bars, which is that when asked to name clubs that he attends he gave the name “the gay club” but was unable to name any others. If the judge had said nothing further, there would be no basis to impugn this part of the decision. However, the judge went on to state that it made no sense for the appellant to go to bars on his own as “what possible enjoyment could he get”. The difficulty with this finding is that many people go to bars on their own, for any number of reasons. It was not, in my view, rationally sustainable for the judge to find that it made “no sense” for the appellant to attend bars alone when this is a common practice.

Conclusion

16. The judge gave numerous reasons for not believing the appellant, some of which are rationally supportable. However, the decision also includes several reasons that are not rationally supportable. The errors are material because the rationally unsupportable reasons form part of the judge’s overall reasoning for rejecting the credibility of the appellant's account. The decision therefore must be set aside.
17. The decision will need to be remade without any findings of fact preserved and it is likely that the extent of judicial fact finding necessary for the remaking of the decision will be extensive. Having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I consider this to be a case where it is appropriate, in accordance with section 7 of the Practice Statement of the Immigration and Asylum Chambers, to remit the matter to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

Appeal Number: UI- UI-2022-003770

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber
27 January 2023