



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-000765
First-tier Tribunal No: PA/00348/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

A N
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Jafar, instructed by Direct Access

For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 31 January 2023

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 appealed the respondent's decision dated 09 February 2021 to refuse a protection and human rights claim.

2. First-tier Tribunal Judge Sweet ('the judge') dismissed the appeal in a decision sent on 07 September 2021. The judge did not find the appellant's claim to be gay credible. He concluded that the appellant would not be at risk of serious harm on return to Kenya for that reason. He also concluded that the appellant would not be at risk of serious harm from his estranged wife.
3. The appellant applied for permission to appeal to the Upper Tribunal. The heads of grounds are not clearly identified, but the main points can be summarised as:
 - (i) The judge failed to have regard to material evidence. This included the appellant's account, contained in his witness statement, of how he came to realise and accept his sexual orientation, as well as other relevant information contained in the asylum interview, and evidence from a Ugandan NGO that works with LGBTQI+ people that was said to be supporting the appellant's partner after he fled Kenya.
 - (ii) The judge failed to give adequate reasons to explain why he rejected the credibility of the appellant's claim to be gay and failed to give adequate reasons to explain what weight he placed on other evidence, including Whatsapp messages between the appellant and his partner.

Decision and reasons

4. Ms Lecointe accepted that the judge had failed to consider the various pieces of evidence outlined in the grounds but said that she could not concede that any errors were material. She argued that it was clear that the judge did not accept the appellant's credibility, having heard from him and a supporting witness.
5. In light of this partial concession, I am satisfied that the First-tier Tribunal decision involved the making of an error of law. The judge had the benefit of hearing evidence from the appellant. Many of his findings relating to the credibility of the appellant's claim were open to him to make. However, the assessment is holistic and must also take into account evidence that might be supportive of the appellant's account.
6. The judge failed to consider the detail of the account given by the appellant in his witness statement and in the interview of his incremental realisation of his sexual orientation during his teenage years and how this conflicted with cultural norms and his religious beliefs.
7. The judge referred to discrepancies in the dates when he said that he accepted his sexual orientation in the witness statement and the interview record. However, when analysed, the appellant appeared to be talking about different points in time. In the interview (qu.57) he said that he was 25 when he 'realised myself and set myself free and got a friend'. I note that some of the questions in that section of the interview were rather opaque and unclear and it seems that the appellant was struggling to understand what he was being asked. However, it seems that he was describing the point when he first entered into a relationship with his partner George, which elsewhere he said was in 2006 i.e. when he was around 24 years old. In his witness statement at [11] he said that he accepted that he was gay in 2001, when he was around 20 years old. It seems clear to me that the appellant was describing different matters at different points in time. The first was his own acceptance that he might be gay, the second was the first time this crystallised into a same sex relationship. Even if there was a perceived discrepancy it was relatively minor. The judge failed to analyse the plausibility of

the relatively detailed description given by the appellant of a process of realisation that was made more difficult by homophobic social mores and religious beliefs that are prevalent in Kenya.

8. The judge rejected the claim that the reason why his partner George had to flee Kenya was because of their relationship or because George was known to be gay. In doing so he failed to take into account relevant evidence from an NGO in Kampala which supports LGBTQI+ people, as well as an affidavit from his partner George. Although the judge considered a medical report describing injuries suffered by his partner, the evidence relating to the difficulties George faced in Kenya should have been considered in the round.
9. The judge rejected the appellant's claim to be in a relationship. Although he noted on two occasions in the decision that there were copies of Whatsapp messages between them in the evidence, he made no findings as to the content of those messages nor give any reasons to explain what weight he might have placed on them.
10. Although none of these pieces of evidence, taken alone, were likely to make a material difference to the judge's overall conclusions relating to the credibility of the claim, when taken together they were capable of supporting the appellant's account. The failure of the judge to consider or to make findings in relation to evidence that was material to a proper assessment of the claim amounts to an error of law. Given the supportive nature of that evidence it is not possible to say that the judge's findings relating to the credibility of the claim inevitably would have been the same. Therefore, the errors were material.
11. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.
12. The usual course of action would be for the Upper Tribunal to remake the decision. Although the judge made findings relating to risk from the appellant's wife, which were not challenged in the grounds of appeal, it seems that the appellant did not dwell on this issue in his witness statement nor rely on it in any meaningful way at the First-tier Tribunal hearing. Mr Jafar argued that any animosity that his wife might have towards him was tied up with his sexual orientation. The two issues were therefore intertwined. In view of the fact that a fresh assessment of the credibility of the appellant's claim will need to be made, I am just persuaded that it is appropriate to remit the appeal to the First-tier Tribunal on this occasion.

Notice of Decision

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal for a fresh hearing

M.Canavan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

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31 January 2023