



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002591
On appeal from: PA/50497/2021
IA/03688/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 June 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE METZER

Between

XX (BANGLADESH)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Michael West of Counsel, instructed by Blackstone Law Associates Ltd

For the Respondent: Mr Stephen Walker, a Senior Home Office Presenting Officer

Heard at Field House on 20 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 is a citizen of Bangladesh who challenged the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 23 January 2021 to refuse him international protection and/or leave to remain on human rights grounds.
2. By a decision sent to the parties on 1 December 2022, the Tribunal set aside the decision of the First-tier Tribunal for remaking in the Upper Tribunal.
3. **Vulnerable appellant.** The appellant asserts that he is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.
4. As he did not attend the remaking hearing, no adjustment was necessary today.
5. **Mode of hearing.** The hearing today took place face to face. The appellant did not attend: neither did the witness Asifa Lahore for whose evidence the Tribunal had previously adjourned the appeal hearing.

Background

6. The appellant is a married man with a wife and family in Bangladesh. He was married in 1992 and has three sons and one daughter. His eldest child was born in 2000 and is now approximately 22 years old. The younger indefinite leave holders were born in 2003 (so 20 years old), 2007 (16 years old) and in 2014 (9 years old).
7. The marriage has failed but the parties remain legally married. The appellant's evidence to the First-tier Tribunal was that he was no longer in communication with his wife, who does not like him, but that his children try to contact him.
8. The appellant has other family members in Bangladesh but has lost communication with them too. He has brothers and a sister in the UK: he 'uses the address' of one of his brothers. There is no communication between the appellant and his sister in the UK.
9. The appellant claims to have met a police officer in 2010, with whom he later had a sexual relationship. That is his only gay relationship disclosed to date.
10. In 2011, the appellant entered France on a Schengen visa. He unsuccessfully claimed asylum there, then returned to Bangladesh in 2012. The basis of that application was his fear of the Awami League because he is a member of Jamaat-e-Islami.

11. The appellant gave an alternative account to the respondent that he returned home because he did not like the culture in France and could not get work there.
12. The appellant then left his home area in January 2013, on his account, and went to live in Dhaka, where he worked in the garment industry to support himself and his family. Alternatively, he did not go there until the end of 2013 and spent only seven or eight months there before coming to the UK in November 2014, working in a restaurant to support his family.
13. The appellant said that he had had a business in his home area, which he has lost during his absence. A friend helped him to get the visa, but he has lost touch with the friend and there was no witness statement from him.
14. The appellant came to the UK on 17 November 2014 on a 6-month visit visa and overstayed. On entry, he assured the Immigration Officer that he intended to return to Bangladesh at the end of his visit. He did not claim asylum.
15. Since entering the UK, the appellant had twice been encountered working unlawfully. He was working in a friend's restaurant, and often staying there also. He told his friend that he had permission to work in the UK. He did not disclose his problems in Bangladesh.
16. When arrested by immigration staff on 25 February 2019, he had been in the UK for over 4 years. The appellant claimed asylum on 25 February 2019.

First-tier Tribunal decision

17. The appellant's claimed fear was twofold: first, on the basis of claimed risk from Awami League activists because of his membership of Jamaat-e-Islami, and second, on the basis of his claimed gay sexual orientation.
18. The First-tier Tribunal heard oral evidence from the appellant and his witness, Ms Asifa Lahore. The First-tier Judge was provided with medical evidence from a doctor who examined the appellant while he was detained in Harmondsworth, diagnosing mild depression and panic attacks, and possible post-traumatic stress disorder. He has type 2 diabetes for which he receives regular medication in the UK.
19. The First-tier Judge found that the evidence before him was not sufficient for the appellant to be treated as a vulnerable person. The judge found that the appellant's account changed every time he gave it and that the appellant was not a reliable witness. His account of his political activities was 'a complete fabrication...the story changes on every occasion that it is told'.
20. The First-tier Judge found, specifically, that the appellant was not, and never had been, a member of Jamaat-e-Islami and was not at risk from

Awami League activists in his home area, or elsewhere in Bangladesh. The judge relied on the appellant's voluntary return to Bangladesh in 2012, after his application for asylum in France on that basis had been unsuccessful and found that the appellant did not have a genuine fear on political grounds.

21. The judge then dealt with the sexual orientation element of the appellant's claim, noting that while it was not implausible for a married man with four children to have a gay (or bisexual) sexual orientation, he had given evidence that he had voted for Jamaat-e-Islami, an Islamist party hostile to homosexuality, because 'their rules and regulations were good', and that his only claimed gay lover was a policeman who was a member of Jamaat-e-Islami.
22. The appellant had given discrepant accounts of when he realised that he was gay, and what was the index event. A detailed account was given in his asylum interview but was not replicated in his 6 October 2021 witness statement. The appellant's account of when he had told his wife and whether she had been involved in helping him leave Bangladesh was also discrepant.
23. In both his screening and full asylum interview, the appellant had said that he had come to the UK to be safe and to 'support my family'. In his full asylum interview, the appellant said that he needed work to support his family and pay for his children's private education in Bangladesh.
24. The First-tier Judge's analysis of the evidence about the appellant's sexuality was as follows:

"68. During his asylum interview in October 2019, he confirmed that Mr Islam was the only gay partner that he had ever had in Bangladesh (and that the incident on 21 February 2013 was the first and only time they "were physical"). He further said that following his relocation ... to Dhaka he did not express his gay sexuality in any way. In that same interview he declared that he has not been openly gay in the UK, and that his sexual identity had not developed since being in the UK. Indeed, he indicated that he was unaware that it was legal to be in a same-sex relationship in the UK. He further said that he is never "going down that [gay] route again" (although shortly before stating this he made a point of expressly saying to the interviewer that he had been to an LGBT Club called 'Sweetbox' (sic) with friends and that photographs were taken). ... In the final questions of the asylum interview he said that "I don't believe that I am currently gay". When challenged on that point, he said "I'm sorry I said it wrong, I am gay. I said I'm not but I am". ...

69. At paragraph 16 of his witness statement dated 06 October 2021, the Appellant asserts that he has "been integrated in the British LGBTQ society and community", although no further information was provided to illustrate this claimed integration. ...

70. During his oral evidence at the hearing the Appellant said that he is not currently in a relationship with any man in the UK. When asked if he had

ever previously had gay relationships with men in the UK, he said “a few of them”, but no further information was supplied. When he was next asked about any relationships with men whilst he was in Bangladesh, he again said “a few of them” (so again contradicting what he said in his asylum interview), but he again provided no further information. ...As regards the photograph of a man standing next to him under a neon sign saying ‘GAY’, and who was also present in all the other photographs clearly taken on the same day at Sweatbox, he first said that he did not know this man but then said the man was a friend whose name he had forgotten. ...He was not asked to identify the other individuals (one sitting on the same park bench as him and one standing with him on a pavement) in the photographs ...

72. I find that there are major discrepancies in the Appellant’s account of what happened to him in Bangladesh. There are also discrepancies and omissions in his account of the life he has lived in the UK, and the contact he has with his family in Bangladesh. The fact that the Appellant once had a cup of coffee at a gay venue (open to all) where he was photographed under a neon sign at that venue saying ‘GAY’, I view not as evidence of his sexual orientation, but rather as an obvious attempt to manufacture evidence to support his threadbare claim. Similarly, photographs of the Appellant standing/sitting with other members of the same sex on a park bench and on a pavement (open to all), or his recent attendance at a gay disco (open to all), is wholly insufficient to demonstrate that he is either homosexual or bisexual. Looking at this aspect of the case in the round, I find the Appellant to be not credible and I give no weight to any of his various assertions. I find his account to be a gay man who fears persecution in Bangladesh to be a complete fabrication. ...”

25. The judge found the gay element of the appellant’s claim also to be fabricated.
26. The appeal was dismissed and the appellant appealed to the Upper Tribunal.

Permission to appeal

27. The grounds of appeal asserted that:
 - (1) the First-tier Judge’s reasoning on the political element of his appeal ‘is legally sound and therefore [he] does not challenge the same’;
 - (2) he disagreed with a number of the First-tier Judge’s findings on his sexuality and how he had become aware of it, and also why he had not mentioned it in his screening interview. He noted that the respondent’s own guidance required her not to make an adverse credibility finding merely because he had not disclosed his sexuality at the first opportunity; and that
 - (3) the First-tier Judge erred in failing to treat the appellant as a vulnerable adult or to give weight to the oral evidence of Ms Lahore.

28. In effect, the grounds of appeal contended that the First-tier Judge's findings of fact and credibility on the sexuality point were unsound and unsustainable.

Permission to appeal

29. Permission to appeal was granted by First-tier Judge Aldridge in the following terms:

"2. The grounds are not without merit. The judge has clearly failed to provide any findings or make any comment in respect of the witness who attended the Tribunal in support of the claim of the sexuality of the appellant. It is arguable that there has been an error of law as the judge may have failed to scrutinise all of the material evidence on appeal. I do not find that the judge erred in respect of the other two grounds raised. The judge provided explanation of those findings, in particular, in respect of the question of vulnerability."

Error of law decision

30. At the error of law hearing on 19 October 2022, Mr Walker for the Home Office conceded that the First-tier Tribunal had made an error of law in failing to make any findings in respect of Ms Lahore's evidence. The Upper Tribunal rejected the remaining grounds.
31. The sexuality element of the appeal was set aside by consent, for remaking in the Upper Tribunal. We recorded the decision and the agreed directions as follows:

"Notice of Decision

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

14. The decision in this appeal will be remade in the Upper Tribunal on a date to be fixed, time estimate 2 hours. No interpreter is required.

15. The appellant intends to call Ms Asifa Lahore to give oral evidence at the resumed hearing. No other new evidence to be heard without the leave of the Upper Tribunal.

16. Liberty to apply."

32. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

33. There were two preliminary applications to adduce additional evidence. For the respondent, Mr Walker made an application under rule 15(2A), which he later withdrew, to adduce newly discovered evidence in the respondent's files indicating that the appellant had been working without leave in the UK even earlier than previously thought. We have not seen that evidence and we did not grant leave to adduce it.

34. Mr West also made an oral rule 15(2A) application to adduce the contents of a supplementary bundle received by the Tribunal on 13 January 2023, which contained an updated letter from Ms Lahore, and a medical report from Dr Mai Kelly dealing with the appellant's mental health. After some discussion, the Upper Tribunal has admitted that bundle in its entirety.
35. Mr West explained at the hearing today that he had been instructed that since sending her letter of 11 January 2023 to his instructing solicitors, Ms Lahore had accepted an out of town commitment which meant that she was unable to give evidence today. We find this very strange: with the facilities available for remote hearings, and had we been put on notice, we consider that it would have been possible to accommodate the relatively brief evidence which Ms Lahore would give. It is possible, of course, that she has decided that she would prefer not to give evidence, but we place no emphasis on that possibility as we have no evidence either way.
36. We therefore have considered Ms Lahore's evidence on the basis of what we do have, including one of three unreported decisions in which she has previously given evidence to the Upper Tribunal, with which Mr West supplied us after the hearing. We are grateful to Mr West for his assistance.

Ms Lahore's evidence

37. In a letter dated 14 December 2021, which was before the First-tier Tribunal, Ms Lahore said that she was a 38-year old gay man who had been transitioning medically to female since 2017. She was not intending to have gender reassignment surgery.
38. Ms Lahore's public profile is high. She had hosted and performed at various Pride events, including several times on the main stage at Trafalgar Square, most recently on 6 July 2019, but also at Pride events in Croydon, Isle of Wight, Portsmouth, Hertfordshire, Warwickshire and Norwich. She had been on television several times, in 2015 in Channel 4's 'Muslim Drag Queens' documentary, watched by 1.1 million people; in 2016 as a singer in Channel 4's 'True Colour' television advertisement; and in 2017, as a voiceover artist, introducing programmes on Pride in London Day.
39. Ms Lahore explained that she was a well-known LGBT person, fully self-employed as Britain's 'First Out Muslim Drag Queen'. She performs, DJs, and runs a prominent LGBT club night called Disco Rani. She also sits on panel discussions and provides diversity training to corporate organisations.
40. Ms Lahore met the appellant online at a virtual Disco Rani in September 2020. From July 2021, Disco Rani resumed in person events. The appellant attended the online and in person events regularly and Ms Lahore appreciated his loyalty. She believed him to be a gay man of Bangladeshi heritage who could not return safely to Bangladesh.

41. In cross-examination during her oral evidence to the First-tier Tribunal, Ms Lahore said that she believed that the appellant attended her events alone. She did not know whether he was in a relationship with any man in the UK.
42. The appellant had asked her to be a witness for him, which she was willing to do. She had contributed to 10 or 12 other immigration appeals, appearing only when she believed the person to be sincere. She had given evidence in the last 12 months at three appeal hearings. There was no re-examination.
43. In the letter which she sent to the Upper Tribunal on 11 January 2023, Ms Lahore explained that she was now a friend of the appellant. She gave the following additional information, updating her previous evidence:

“Since meeting XX I have made a friendship which has seen him come to my flat a few times and meeting him in a personal capacity. I fully believe he is of the queer community and understand is hard circumstances. I believe him to be a gay man because he is aware of Queer terminology. Even though we do not converse in English, Queer words such as top, bottom and vers are used in Hindi and Urdu. I have seen him flirting with other men in the club scene and this is something that cannot be put on. Lastly, he is a big fan of the make-up and fashion sense of Noor J.

I have got to know him quite well and am aware of his situation as an asylum seeker and feel that if he were returned to Bangladesh he would face persecution for being gay. He has told of me the dangers he would face in such a restrictive society and I worry for his safety if he were forced to return.”

That completes the evidence of Ms Lahore which is before us today.

Medical evidence

44. We have admitted into evidence a psychological report, completed on 10 January 2023, from Ms Mai Kelly BSc Hons, MA, PostMA Dip, PostMA Dip CBT, CPsychol, Registered CBT Specialist, who describes herself as an independent Chartered and Registered Practitioner Psychologist, a Registered CBT HI Specialist, and a Consultant Counselling Psychologist. The report was completed by reference to DSM V and the *Ikarian Reefer* guidelines on expert witnesses.
45. The appellant was seen just once on January 6 2023 for ‘approximately 105 minutes’, and by video link. The appellant’s English was poor: he needed an interpreter during the assessment. No neurological or physical tests were conducted, although Dr Kelly recommended that they should be conducted subsequently.
46. Dr Kelly found that the appellant presented with significant concentration problems, poor memory and difficulty remembering clear details of his past and trauma induced events. She noted that his narrative ‘seemed confused and clarifications were required throughout our assessment’.

47. After setting out the appellant's account of his history, and his medical conditions (type 2 diabetes, dyspepsia and high cholesterol) and his symptoms (headaches, dizzy spells, breathlessness, rapid heartbeat, loss of appetite, weight fluctuation, limb pain (in particular leg pain), very low energy and lethargy, and poor and disturbed sleep, Dr Kelly noted that the appellant had been prescribed Linagliptin (5 mg) and Metformin (500 mg), both for his diabetes; Omeprazole (20 mg) for his indigestion and heartburn; and Simvastatin (40 mg) for his high cholesterol. Even with this regime, his diabetes and cholesterol were not controlled adequately.
48. Two psychological questionnaires were administered: the Patient Health Questionnaire (PHQ-9), on which the appellant scored 27/27 'suggesting severe symptoms of depression', and the Generalised Anxiety Disorder questionnaire (GAD-7), on which the appellant scored 21/21, 'suggesting severe symptoms of anxiety'. Later in her report, Dr Kelly stated that the PHQ-9 score was 26/27 and the GAD-7 score 19/21.
49. Dr Kelly also administered the Impact of Events Scale (IoES), a test aimed at identifying elements of post-traumatic stress disorder. She made a preliminary diagnosis of post-traumatic stress disorder based on an outcome score of 58/88, where the clinical threshold is 33/88.
50. There is no suggestion that the appellant has ever approached his general medical practitioner complaining of anxiety, depression, or PTSD, although he is under medical supervision for his diabetes and other ailments.
51. Dr Kelly's conclusions are at 5.4 and 6.1-6.3:

"5.4 Risk Assessment

Following [the appellant's] assessment and psychometric testing, I believe his current suicidal risk is **Moderate**; He denied previous suicide attempts but described frequent thoughts about his death and self-harming behaviours such as scratching his hands (self-harm behaviours are common symptom among a population of homosexual immigrants and often stemming from a deep dislike of the body they were born in and the gap between their cultural and sexual identity).

It is in my professional opinion that [the appellant] can be readily categorised as a vulnerable individual in his current state. I am particularly concerned about further deterioration in his current mental and physical health that can be caused by negative changes to his personal and immigration status and by the deep desperation and emotional pain he is currently experiencing. I would strongly recommend regular supervision and monitoring by his GP and/or mental health practitioner; My main concern is with the risk of impulsivity in the absence of perceived and actual safety and security for himself and loved ones.

6.1 Conclusion

6.1 In my professional opinion, it can be concluded that at present, [the appellant] remains an Adult at Risk as per the Guidance on Adults at Risk in Immigration Policy (December 2016).

6.2 Considering his assessment, the psychological measures' outcome, his medical record and certainly his observed behaviours, dire emotional state and dissociation during our assessment session, I cannot see a situation in which [the appellant] would survive a trip and/or his stay in Bangladesh if he was forced to leave the UK; given the level of his physical, psychological and emotional vulnerability and his negative self-perception, I doubt he will be able to manage a new life anywhere else, even if we assume that he is safe to travel and enter the country; It is a known and common assertion that there is a reciprocal and mutually impactful relationship between physical and mental health; It can be easily noticed that such negative relationship exists in [the appellant]'s case and that he is struggling managing both. In my professional opinion, he would struggle with both if he does not receive the psychological treatment he so desperately need and without a sense of safety.

6.3. If his sense of safety is breached or challenged in any way, or if he is threatened with deportation, [the appellant's] psychiatric condition (as well as his physical conditions) is likely to inevitably worsen should he be pressured to travel or change his circumstances;

In my professional opinion, any change to his environment including a removal from the country through flying or other means of transportation in his fragile psychological state is likely to significantly impair his mental health and wellbeing and carries a high risk of harm for [the appellant]. It is my recommendation that such actions should be postponed until his symptoms are improved. "

Submissions

52. We heard submissions for the appellant from Mr West as to the weight which could be given to Ms Lahore's evidence in her absence, and the passages in Dr Kelly's report which we should consider.
53. We also heard submissions for the respondent from Mr Walker, who relied on the refusal letter and argued that Ms Lahore's updated statement letter did not take matters any further. There was no deep friendship, although her evidence was that she did know him. The Tribunal should give the evidence of Mr Lahore, and the new medical evidence, such weight as it would bear.
54. We have had regard to all the submissions made, and also to all of the evidence from Ms Lahore and Dr Kelly, in the context of the preserved findings of the First-tier Tribunal.
55. We reserved our decision, which we now give.

Analysis

56. We consider first what weight we can give to the evidence of Ms Lahore. We have seen one of the decisions in which her evidence had been before the First-tier Tribunal (PA/10458/2017), although it is not one of those in the last 12 months mentioned in her letter. Her representatives have not been able to trace those decisions and provide them to the Upper Tribunal.

57. In common with the present decision, in that appeal Ms Lahore gave evidence in the First-tier Tribunal to the effect that she, who was herself transsexual and had formerly identified as a gay man and that she 'had seen and observed the appellant in a number of relevant settings'. The complaint in that decision was that the First-tier Judge had found Ms Lahore credible but not had regard to her evidence.
58. Reading the decision as a whole, the Upper Tribunal in that decision upheld the decision of the First-tier Tribunal that the appellant had not established that he was gay.
59. In the present appeal, Ms Lahore was cross-examined in the First-tier Tribunal and we have a record of what seems to have been a fairly brief cross-examination. We have the newer evidence, the strongest elements of which are that Ms Lahore now regards the appellant as a friend, but still does not see him arrive at her club with any other man. She says that she has seen him 'flirting with other men' and that 'this cannot be put on'.
60. Absent any opportunity to test or explore those statements with Ms Lahore, we are not satisfied that the evidence now before us assists the appellant. We do not consider the further untested written evidence from Ms Lahore materially advances the appellant's credibility. We note that there is no evidence from his friends or family in the UK, not even from the brother whose address he still uses. His own account was so changeable and lacking in credibility, as identified by the First-tier Judge, that much more would be needed to satisfy us that he is gay, as he has alleged.
61. We consider that Dr Kelly's report lacks rigour. We further consider that if the appellant's mental health was of such severity as to give a perfect score on both of the questionnaires, and given his supervision by his general medical practitioner for his diabetes and other ailments, that he would have been prescribed medication or referred for assistance with his mental state. This report is the first mention of suicidal thoughts, which are described as falling below the level of any attempt or specific plan to carry out such an attempt.
62. We are unable to place much weight on Dr Kelly's conclusions, which descend into the arena and beyond the expert's area of expertise.
63. Having considered the evidence and submissions before us today, and having regard to the undisturbed findings in the First-tier Tribunal decision, we do not find that the evidence of Ms Lahore or Dr Kelly is such as to render the appellant's account of his gay sexual orientation credible. His entire account is riddled with inconsistencies which have not previously been ascribed to post-traumatic stress disorder, and Dr Kelly does not go so far as to do so in her report, although this is one of her areas of expertise.
64. We therefore remake the decision by dismissing the appellant's appeal.

Notice of Decision

65. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. We remake the decision by dismissing the appellant's appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 23 January 2023