



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000953
First-tier Tribunal No:
PA/00201/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PKH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown, instructed by Broudie Jackson Canter Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

Heard in a hybrid hearing at Field House on 25 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Iraq born on 29 August 1991. He arrived in the United Kingdom on 28 March 2019 and claimed asylum. The basis of his claim was that he is a gay man and that he feared persecution from his family and wider society if he were to be returned there. His application for asylum was refused and his appeal before First-tier Tribunal Judge Raikes was dismissed in a decision and reasons dated 10 December 2019.
2. The Appellant subsequently made a fresh claim on 19 August 2021, based essentially on *sur place* evidence of his sexual orientation. In a decision dated 22 December 2021, the Secretary treated the fresh submissions as a fresh claim and refused it with the right of appeal. The Appellant exercised that right of appeal and his appeal came before Judge Mack for hearing on 7 February 2023.
3. In a decision and reasons promulgated on 16 February 2023, the judge dismissed the appeal on the basis that, following Devaseelan [2002] UKAIT 00702, the previous findings of Judge Raikes were upheld and that he did not accept the Appellant's credibility as to his sexual orientation.
4. An application for permission to appeal was made, in time, on 25 February 2023 on the following grounds:

Ground 1: Perversity: sexual behaviour as proof of sexual orientation

- (i) the Appellant's sexual partner gave evidence before the Tribunal and gave evidence concerning their relationship, which was unchallenged by the Respondent's representative, however at [60] the Judge found that his evidence was "*purely an agreement between the parties to have sex, Mr A being clear he is not the appellant's partner. This is not to be taken as him accepting that the appellant has a sexual relationship with Mr A as a consequence of his gay sexuality.*". It was submitted that this a failure to provide adequate reasons as to why the Judge considered the motivation for that arrangement is something other than the Appellant's gay sexuality and a material legal error. Further or in the alternative, if the inference is that the Appellant has sex with Mr A solely to advance an ill-founded asylum appeal there was no evidential basis for this conclusion;

Ground 2: procedural unfairness/misdirection in law: adverse inference from the Appellant's silence

- (ii) the Appellant did not give oral evidence before the First tier Tribunal but called evidence from 3 other witnesses of fact who spoke to his sexual behaviour and involvement with organisations engaged with the LGBTQ+ community in the UK. It is a well-established principle of asylum law that a judge is not entitled to base an adverse credibility finding on the fact that the Appellant was not tendered for cross-examination: SM (Iraq) [2004] UKIAT 00279. At [60] the Judge drew a specific adverse inference from the fact that the Appellant did not give oral evidence but rather called 3 witnesses of fact who gave relevant evidence going to the issue in dispute and the Judge acted unlawfully in drawing an adverse inference in the circumstances and the double-count the significant of the previous determination as it relates to the Appellant's general credibility as a witness;

Ground 3: perversity/giving undue weight to immaterial considerations: damaging stereotypes

- (iii) The Appellant's case is that he was a closeted homosexual in Iraq but that he has, since arrival in the UK, become increasingly involved with LGBTQ+ organisations and provided evidence of this, also a cruising app and attendance at saunas and cruise clubs. It is clear from page 286 of the Equal Treatment Bench Book that "for a variety of reasons including damaging stereotyping applicants for asylum on this basis may have difficulty in proving their sexual orientation." At [65] of the decision the Judge found that the Appellant's interest in LGBTQ plus organisations coincided with him becoming appeal rights exhausted and making fresh submissions, which he did not find to be a coincidence. This approach is erroneous both because no reason is given for discounting this evidence other than the fact it occurred after the previous Tribunal which cannot be a reason for discounting this evidence and secondly the Judge made a damaging and stereotypical assumption that if the Appellant were homosexual he would have engaged himself with LGBTQ+ organisations immediately on arrival in the UK and no later than his previous appeal. Further, the Judge failed to take into account the fact that between his appeal being dismissed on 21 February 2020 and his fresh claim submissions on 19 August 2021, the Appellant spent a significant period of time under various restrictions on social gatherings ie it was against the law for gatherings of more than 6 people to take place between 23.3.20 and 19.7.21.

Ground 4: inadequate reasoning – section 8

- (iv) At [66] the Judge found that section 8 was engaged due to the fact the Appellant travelled through other European countries on his way to the UK and entered the UK clandestinely. However, the Judge either misunderstood the statute or gave inadequate reasons for reaching a conclusion that the Appellant's general credibility has been damaged by entering clandestinely and this is a material legal error.

Ground 5: giving weight to immaterial considerations

- (v) The determination is difficult to follow and reads as a series of scattered, often internally contradictory observations about the Appellant and his claim and it is difficult to appreciate how the Judge weighed the evidence, given the on the facts as he found them the Appellant has sex with a gay man who is in an open relationship with his boyfriend and whatever the mutuality of the commitment to the relationship the Appellant is a homosexual. Whether the Appellant and Mr A have a committed, exclusive, monogamous relationship is irrelevant to the question of motive and the Judge further took obscure points at [29]-[39] as undermining the credit to be accorded to his evidence.

Ground 6: failure to apply anxious scrutiny, failure to take into account material evidence viz the evidence of Dr Turner

- (vi) Dr Turner is a former advisor to the UK government in respect of LGBT matters and the chief executive of Lancashire LGBT and was called to give evidence in respect of the records his organisation held in respect of the Appellant. At [64] the Judge held that the fact the Appellant had limited involvement with Dr Turner prior to the hearing undermines his claim to be a gay man; but makes no reference to the evidence of Dr Turner as to police involvement in the Appellant's case due to concerns he may be at risk of homophobic hate crime.

5. Permission to appeal was granted by First-tier Tribunal Judge Clarke on 22 March 2023, where the judge noted that the grounds of appeal included challenges to perversity of the findings, procedural unfairness, giving undue weight to immaterial considerations, inadequate reasoning, a failure to apply anxious scrutiny and a failure to take account of material facts. He held:

“3. It is arguable that the Judge failed to provide adequate reasons why the lack of a committed relationship between the Appellant and his witness, Mr A, led to the conclusion that the Appellant is not a gay man when the Judge found that what existed was ‘purely an agreement between the parties to have sex’ and the evidence was that they had an open relationship. Arguably, the Judge has made inadequate reasons for finding that sexual activity took place between the Appellant and Mr A but found that the Appellant was not a gay man.

4. Moreover, it is arguable that the Judge has made inadequate findings as to why the absence of ‘independent medical and other reports’ (Paragraph 53) on the issue of whether the Appellant has an intellectual disability damaged the ‘general credibility of the claim’.

5. It is also arguable that the Judge made inadequate findings in respect of the assessment of the evidence of Dr Turner (Paragraph 63). It is also arguable that the Judge did not make any findings on the potentially material evidence that Dr Turner’s organisation referred the Appellant to the police over concerns that the Appellant was at risk of homophobic violence within the community”.

Hearing

5. At the hearing before the Upper Tribunal, Mr Brown indicated that, having spoken to Ms Lecointe, they had reached agreement that the manner in which the judge had dealt with the Appellant’s sexual orientation was unsafe. Ms Lecointe for her part confirmed that agreement and submitted that it was not clear whether the judge accepted the evidence of the Appellant’s sexual partner or not, nor had the judge considered Dr Turner’s evidence properly in the determination.

6. In light of the parties’ agreement I find that the judge erred materially in law in his findings in this case, in particular, in relation to his treatment of the evidence of the Appellant’s sexual partner who I shall refer to in this decision as Mr A, his evidence is recorded at [43] of the judge’s decision and it includes the assertion that he has had sex with the Appellant on a regular basis.

7. At [45] the judge said: *“I have found the statement of Mr H sorely lacking in terms of any actual dates of events, the only date given by Mr H was that he met the appellant in early 2021”* and the judge had other concerns which he set out at [47] and [48], concluding at the end of [48]:

“I can readily accept he is a friend of the appellant, however, I find it likely, when looking at his evidence as whole, in particular his actual avoidance of any detail, then this reduces my ability to accept he is in a sexual relationship with the appellant. I put this evidence in the mix and consider it in the round as part of my overall assessment”.

8. The judge at [60] then returns to the subject finding as follows:

“Mr H does not talk of any actual relationship time having taken place between himself and the appellant, I consider what he actually describes is purely an agreement between the parties to have sex, Mr H being clear he is not the appellant’s partner. This is not to be taken as me accepting that the appellant has a sexual relationship with Mr H as a consequence of his gay sexuality”.

9. At [61] the judge goes on to consider that the Appellant is claiming to have more than just a sexual relationship with Mr A. I consider, in line with the representatives, that the judge’s findings on the key issue in this appeal, i.e. the Appellant’s sexual orientation, do lack sufficient clarity. On the one hand the judge appears not to accept that the Appellant is engaging in a sexual relationship with another man, but then at [60] he appears to make a finding that there is a sexual relationship between the Appellant and another man which would essentially corroborate the Appellant’s claim to be a gay man. That is sufficient in my view to set aside this decision and to remit the appeal for a hearing *de novo* before the First-tier Tribunal, but for the avoidance of doubt, I also find merit in Grounds 2-6 of the grounds of appeal.

Notice of Decision

10. The decision and reasons of the First tier Tribunal Judge is vitiated by error of law. I set that decision aside and make the following directions:
 - 10.1. The appeal should be remitted for a hearing *de novo* before the First-tier Tribunal.
 - 10.2. The appeal should be listed for three hours.
 - 10.3. The Appellant’s solicitors should inform both the First-tier Tribunal at Manchester and the Home Office also in Manchester 14 days prior to the hearing as to whether or not the Appellant will be giving oral evidence and, therefore, whether an interpreter will be required.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 September 2023