



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006693

First-Tier Tribunal No:

PA/52774/2020

IA/02338/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th June 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AU

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Ms S Nwachuku, Senior Presenting Officer

For the Respondent: Mr A Slatter, Counsel, instructed by TMC Solicitors

Heard at Field House on 29 May 2024

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

Introduction

1. For the sake of continuity, I shall refer to the parties as they stood before the First-tier Tribunal: thus, the Secretary of State is once again “the respondent” and Mr AHU is “the appellant”.
2. The respondent appeals against the decision of First-tier Tribunal Judge Munonyedi (“the judge”), promulgated on 7 June 2022 following a hearing on 17 May of that year. By that decision, the judge allowed the appellant’s appeal against the respondent’s refusal of his protection and human rights claims. Specifically, the judge accepted that the appellant was gay, that he would wish to live openly in Somalia, and based on an express concession by the respondent at the hearing, she concluded that he would be at risk on return to that country with reference to the Refugee Convention and Article 3 ECHR.
3. The appellant is a foreign criminal and the subject of a deportation order who had already been through proceedings and the First-tier Tribunal in 2018. By a decision promulgated on 18 January 2019, First-tier Tribunal Judge Walker had concluded that deportation was proportionate and that the appellant was not at that time at risk on return to Somalia primarily on the basis of the country guidance decision of MOJ and Others (Return to Mogadishu)(Rev 1) CG [2014] UKUT 00442 (IAC).
4. After becoming ‘appeal rights exhausted’ the appellant provided further submissions to the respondent in May 2019 and would be at risk on

return to Somalia for that reason. Those submissions were treated as a fresh claim and the appellant went through the usual consideration process, which resulted in the respondent's refusal decision of 2 December 2020.

The judge's decision in summary

5. The judge set out the relevant background, summarised the respondent's reasons for refusing the appellant's claims, then summarised the appellant's account and the respective submissions, and went on to provide her analysis of the evidence. She made reference to a well-known report by Dr Stuart Turner and Dr Jane Herlihy on the subject of memory, disclosure and credibility: [21]. At [22]-[32] the judge found that the appellant had been truthful as to his account of his sexuality. She acknowledged the relevance of the Devaseelan principles relating to Judge Walker's decision: [24]. She accepted that the appellant was fearful of his family finding out about his sexuality, but concluded that he would wish to live an openly gay life: [28]-[29]. Based on that latter finding, the judge concluded that in light of HJ (Iran) v SSHD [2010] UKSC 31 and the respondent's express concession on risk on return (if the appellant were found to be gay and that he wished to live openly as such), the appeal fell to be allowed: [33]-[38].

The grounds of appeal

6. I do not propose to quote the entirety of the respondent's grounds of appeal here, but it is important to recognise their narrow scope. What might be described as the first ground ([1]-[5]) can be summarised as follows:

(a) when assessing the credibility of the appellant's current claim, the judge failed to have regard to the appellant's "general lack of credibility due to their criminality";

(b) the judge failed to have regard to Judge Walker's adverse credibility findings;

(c) the judge failed to properly apply the Devaseelan guidance;

(d) the judge failed to address section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

7. The second ground of appeal ([6]) contends that, on the appellant's own evidence, he had lived discreetly and would continue to do so in the future. Therefore, the judge erred in concluding that he could succeed under HJ (Iran).
8. Permission on both grounds was granted by the First-tier Tribunal.

Rule 24 response

9. Prior to the error of law hearing, Mr Slatter provided a detailed rule 24 response.

The hearing

10. Ms Nwachuku relied on the grounds of appeal without amendment and reiterated a number of points contained therein. In addition, she submitted that even if some of the points had not been raised prior to, or at, the First-tier Tribunal hearing, they were "Robinson obvious" and the judge should have considered them. As to section 8 of the 2004 Act, the judge should have expressly dealt with this provision. The appellant's evidence as to whether he would wish his sexuality to remain private or would wish to live openly was inconsistent.
11. Mr Slatter relied on his rule 24 response. He submitted that the respondent had entirely failed to identify which aspect of Judge Walker's findings had been relevant to the assessment of the appellant's credibility before the judge. Neither the reasons for refusal letter nor the review had clearly identified the matters now being relied on in the grounds of appeal. Further, he submitted that Judge Walker's adverse findings had not been relevant. The judge had effectively dealt with the

issue of late disclosure. As to the appellant's evidence as to how he would wish to live his life, the grounds were selective: the interview record and witness statement contained passages making it sufficiently clear that he would wish to live openly, but for the consequences of doing so if in Somalia. Finally, Mr Slatter submitted that the "Robinson obvious" submission made by Ms Nwachuku did not stand up to scrutiny.

12. In reply, Ms Nwachuku reiterated a number of points already made.

13. At the end of the hearing I reserved my decision.

Conclusions

14. Without citing the numerous pronouncements from the Court of Appeal to this effect, I remind myself of the need for appropriate judicial restraint before interfering with a decision of the First-tier Tribunal. This is particularly so where there has been a variety of evidential materials, followed by finding of fact and overall conclusions based thereon.

15. I conclude that there are no material errors of law in the judge's decision. My reasons for this conclusion are as follows.

16. The judge was clearly aware of Judge Walker's decision and she directed herself to Devaseelan, confirming at [24] that the latter meant that the former represented the "starting point". There is no sound basis on which I should conclude that, having directed herself appropriately, the judge then immediately went on to mis hi am I still the the so apply that well-known guidance, which included the need to treat late disclosure of relevant matters with real caution (a point to which I will return).

17. Beyond that there is in my judgment real merit in Mr Slatter's rule 24 response and his contention that the respondent had failed to identify with any reasonable specificity which aspects of Judge Walker's findings to the judge's assessment of the appellant's credibility. As far as I can

see, there was nothing in the reasons for refusal letter or the review which raised particular findings made by Judge Walker as being of relevance to the appellant's credibility in the current proceedings.

18. That failure brings into play the guidance provided by the Upper Tribunal in Lata (FtT: principle controversial issues) [2023] UKUT 00163 (IAC) (the decision post-dates that of the judge in this case, but the points made are clearly still applicable - the proceedings in Lata related back to 2022, as in this case). The judicial headnote reads as follows:

"1. The parties are under a duty to provide the First-tier Tribunal with relevant information as to the circumstances of the case, and this necessitates constructive engagement with the First-tier Tribunal to permit it to lawfully and properly exercise its role. The parties are therefore required to engage in the process of defining and narrowing the issues in dispute, being mindful of their obligations to the First-tier Tribunal.

2. Upon the parties engaging in filing and serving a focused Appeal Skeleton Argument and review, a judge sitting in the First-tier Tribunal can properly expect clarity as to the remaining issues between the parties by the date of the substantive hearing.

3. The reformed appeal procedures are specifically designed to ensure that the parties identify the issues, and they are comprehensively addressed before the First-tier Tribunal, not that proceedings before the IAC are some form of rolling reconsideration by either party of its position.

4. It is a misconception that it is sufficient for a party to be silent upon, or not make an express consideration as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a judge is not required to trawl through the papers to identify what issues are to be addressed. The task of a judge is to deal with the issues that the parties have identified.

5. Whilst the Devaseelan guidelines establish the starting point in certain appeals, they do not require a judge to consider all issues that previously arose and to decide their relevance to the appeal before them. A duty falls upon the parties to identify their respective cases. Part of that process, in cases where there have been prior decisions, will be, where relevant, for the parties to identify those aspects of earlier decisions which are the starting point for the current appeal and why.
6. The application of anxious scrutiny is not an excuse for the failure of a party to identify those issues which are the principal controversial issues in the case.
7. Unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.
8. A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal.”
19. The respondent did not assist the judge in providing clarity and a focus on what were (on the respondent’s case now) apparently important matters, namely, Judge Walker’s adverse credibility findings. Significantly, and with reference to [5] of the judicial headnote, the mere fact that there had been a previous decision did not of itself require the judge to consider each and every matter that had been considered before.
20. Ms Nwachuku’s reliance on the “Robinson obvious” was, as submitted by Mr Slatter, misconceived. As is made clear once again in Lata, this point does not act in favour of the respondent on the facts of the present case: [35] of Lata and see also AZ (error of law: jurisdiction; PTA practice) [2018] UKUT 00245 (IAC). As an observation, one wonders why, if the point was said to be “obvious”, no specific points arising from

Judge Walker's decision were identified in either the reason for refusal letter or the review.

21. There is no evidence the respondent's representative made any oral submissions to the judge containing specific references to Judge Walker's decision.
22. There is an 'in any event' issue here as well. Even if specific aspects of Judge Walker's findings raised by the respondent, it is difficult to see how they were relevant to the judge's assessment of the appellant's evidence. For example, Judge Walker made adverse findings in respect of the deportation issue, but that had no apparent bearing on the sexuality claim. Adverse findings about the appellant's family connections to Somalia were also seemingly irrelevant. As far as I can see, and contrary to an assertion made in the grounds of appeal, there were no adverse findings relating to a claimed kidnapping, nor in respect of clan membership.
23. As to the point about the "general lack of credibility due to [the appellant's] criminality", the judge was plainly aware of his past offending and there is no evidence from the respondent to indicate that this point was raised before her. There is no error in the judge failing to expressly consider whether the simple fact of the appellant's offending in some way rendered his evidence of sexuality untruthful.
24. Turning to the specific issue of late disclosure of the appellant's sexuality, I acknowledge that the judge did not refer in terms to section 8 of the 2004 Act. It might have been ideal if she did. However, I am in truth concerned with substance rather than form in respect of section 8 and late disclosure, and in my judgment the same applies to the Devaseelan point referred to earlier. I am satisfied that the judge was (a) fully aware of the background to appeal before Judge Walker (b) fully aware that the sexuality claim had been made after that appeal had come to an end (c) cognisant of underlying reasons for late disclosure, as

set out in the report by Dr Turner and Dr Herlihy (there is no challenge to the judge's reliance on that item of evidence), and (d) aware of the appellant's own evidence as to why he had not disclosed his sexuality sooner. In that context, the judge made what she described as a "cumulative" evaluation of the evidence and found the appellant to be credible. It is implicit in that overall assessment that the appellant's credibility had not been materially damaged by the late disclosure. Thus, the substance of section 8 was addressed.

25. Bringing all of the above together, I conclude that the respondent has failed to demonstrate that the judge made any material errors of law in respect of her assessment of the evidence as a whole.
26. Beyond the respondent's criticisms in the first ground of appeal, it is clear to me that the judge was fully entitled to reach the findings that she did. Another judge may have reached a different conclusion, but that is self-evidently not the point here.
27. Turning to the second ground of appeal, I agree with Mr Slatter submission that the respondent's criticisms are somewhat selective in terms of the evidence referred to at [6] of the grounds. It is the case that the appellant has stated that he was a private person, that he did not wish his family to find out, and that he did not wish to talk about his sexuality openly. However, it is also clear from the asylum interview record and several passages in his witness statement that he had expressed a desire to live as an openly gay man if that were permitted. Reading the judge's decision sensibly and holistically, I am satisfied that she had all of the evidence in mind when reaching our overall findings. It is tolerably clear from the decision that she was aware of the difficulties faced by the appellant by virtue of his sexuality (she described him as being "conflicted"). However, on the evidence before her, the judge was entitled to find that the appellant would wish to live openly gay life, albeit that he would not want his family to find out and was aware of the risk of living openly if returned to Somalia.

28. Although the judge did not explore the point, and it did not feature in submissions before me, one does in my view need to consider carefully what might be meant by the term “openly”. It must surely represent something of a spectrum, dependent on the personality of the individual concerned. What might be “open” to one person may well be considered relatively low-key to another. There is no standard of “openness”, as it were. In the present case, the appellant had expressed a desire to have a partner and the judge accepted that evidence. Being in a relationship should not, on the basis of HJ (Iran) and as a matter of principle, entail having to maintain absolute secrecy in order to avoid not simply opprobrium from family, but violence from society and/or the authorities.
29. It follows that, applying HJ (Iran) and in light of the respondent’s concession as to risk on return, the judge was entitled appellant should succeed in his appeal.
30. As there are no material errors of law, the respondent’s appeal to the Upper Tribunal must be dismissed.

Anonymity

31. It is appropriate to maintain the anonymity direction previously made. This case involves international protection.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision stands

**H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 29 May 2024**