IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002801

First-tier Tribunal No: LP/00242/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of September 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

A1
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Wood, IAS
For the Respondent: Mr Lawson, Senior Presenting Officer

Heard at Field House on 4 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family 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 any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

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1. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Handler ('the judge'), promulgated on 1 March 2024, to dismiss his appeal on protection grounds.

Procedural Background

2. On 24 November 2019, the appellant claimed asylum based on his sexuality as a gay man. The respondent refused the claim in a decision dated 3 June 2020 which was the subject of the appeal proceedings. The matter came before the judge at a hearing on 22 February 2024. The lengthy delay between the refusal decision and the appeal hearing is a consequence of a previous decision of Judge McClure being found by the Upper Tribunal to involve a material error of law. The appeal was heard *de novo* by Judge Handler following remittal. At [4], the judge confirmed that she had neither read the decision of Judge McClure nor the decision of the Upper Tribunal setting it aside. She was not invited by either side to consider these previous decisions.

3. At [5], the judge recorded that she acceded to the application to treat the appellant as a vulnerable witness for the purposes of the hearing. The agreed principal controversial issues were set out at [6]. The second issue identified was whether the appellant was gay or reasonably likely to be suspected of being so. It was confirmed, at [7], that the respondent did not suggest that sufficiency of protection or internal relocation could defeat the asylum claim if the appellant was found to be gay.

4. The judge articulated extensive findings of fact and gave reasons for the key findings between [14] and [37]. Overall conclusions on the protection claim and specific findings on the principal controversial issues were given between [39] and [41]. In broad summary, the judge did not find the appellant to be a credible witness despite rejecting some of the points raised by the respondent. Importantly, she did not find to a reasonable degree of likelihood that the appellant was a gay man nor that he was wanted by the Ugandan authorities following a claimed raid on a bar in November 2019.

The Grounds of Appeal and the Grant of Permission

5. The appellant sought permission to appeal against the judge's decision on five grounds. In broad terms, the grounds can be summarised as follows:

- Ground one – the judge failed to have sufficient regard to the appellant's vulnerability in the assessment of his credibility.
- Ground two – the judge's reasoning was irrational in finding the appellant to be broadly lacking in credibility after rejecting some of the respondent's challenges to the accounts he gave under questioning about how he came to understand his sexuality.
- Ground three – a mistake of fact infected the overall credibility assessment in that the judge was manifestly wrong (when seen against the decision of Judge McClure) to find that the appellant had not disclosed relying on false documents about his employment in Uganda prior to giving oral evidence before her.
- Ground four – a procedural irregularity in failing to put to a witness concerns later expressed in the decision about a lack of detail in his evidence.

- Ground five – that the decision cannot be reconciled with the required degree of anxious scrutiny.

6. In a decision dated 14 May 2024, First-tier Tribunal Judge Aldridge granted permission to appeal without limiting the grounds of appeal which could be argued. However, in the reasons for granting permission, the permission judge only appeared to find that ground three was arguable.

Error of Law Hearing

7. Mr Lawson explained at the outset of the hearing that he conceded that the decision of the judge involved material errors of law. I asked him to elaborate on which grounds persuaded him not to contest the appeal. He initially referred to ground one as being made out before I directed him to [32] of the decision which appeared, at least on its face, to address the appellant’s vulnerabilities in the context of the assessment of his credibility. Mr Lawson resiled from the suggestion that ground one was established. He then turned to ground three and explained that the judge had, beyond any sensible argument, proceeded on a false factual premise that the appellant had, for the first time in his oral evidence before her, accepted that he had relied on false documents about his employment with the Civil Aviation Authority (‘CAA’). This was demonstrably inaccurate because Judge McClure had noted similar evidence at [62] of his decision.

8. I indicated that I was satisfied that the decision of the judge involved a material error of law on the strength of ground three only. I explained that I would provide my reasons in a reserved decision. I heard from the parties on the question of disposal upon the finding of a material error of law. Mr Lawson argued that the mistake of fact tainted the overall credibility assessment which was central to the overall decision to dismiss the appeal. He further submitted that broad findings of fact were needed which militated in favour of remitting the appeal to the First-tier to decide the matter *de novo*. Mr Wood pointed to the lengthy procedural history and argued that I should preserve some of the findings of fact at [31] of the judge’s decision and that these should function as the platform on which I should remake the decision and allow the appeal because the judge should have accepted that he was a gay man on these findings and simply allowed the appeal.

Decision on Error of Law

9. As I indicated at the hearing, I am satisfied that the decision involved the making of a material error of law in relation to ground three, namely, a material mistake of fact. This type of error of law was considered in the leading authority of E & R v SSHD [2004] Q.B. 1044. At [66] of the judgment of Carnwath LJ (as he then was), the following considerations were held to be of importance in assessing whether a mistake of fact amounts to an error of law:

> […] *First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.*

10. When I turn my mind to the considerations identified in E & R, I am entirely satisfied that the judge was mistaken about a fact which existed at the time of her decision that the appellant had only 'come clean' for the first time in the proceedings before her. The judge could not have been clearer, at [30(e)] of her decision, that she had taken the view that the appellant's evidence, that he had never been employed by the CAA, and that the documents which gave a contrary impression were not reliable, emerged for the first in the hearing before her. I am equally satisfied that the fact that he had previously disclosed this information is established by [62] of the set aside decision of Judge McClure. I have no cause to doubt that this was an accurate reflection of the evidence he heard. The third consideration caused me some hesitation because Judge Handler could hardly have been expected to have been aware of the evidence provided to Judge McClure when she was not invited by the parties to consider this overturned decision. However, the third consideration from E & R is not whether the judge who made the mistake is blameless, as Judge Handler unarguably was, but whether the appellant (or his advisors) was at fault. While the representatives undoubtedly played a part in the judge being led astray, it would not be right to characterise this as being at fault. One can well understand why caution might be the watchword when considering whether it would be appropriate to ask a judge to consider a previous decision which had been set aside as involving errors of law. There is a danger that the subsequent judge might be influenced by legally unsound findings of fact. I note that the Home Office Presenting Officer shared the view of the appellant's representative that it would be wrong to put the previous decision before the judge. There would appear to be nothing which might have alerted the representatives that the timing of the appellant's disclosure about his employment with the CAA would become a matter of importance. It seems to me that the appellant and his advisors cannot be properly described as being at fault. The final consideration is materiality, which is not to be confused with being decisive. This part of the appellant's evidence was addressed in some detail in one of six paragraphs which underpinned the decision to find the appellant to be lacking in credibility. I am entirely satisfied that this dimension of the credibility assessment was material, albeit not necessarily decisive, to the overall conclusion to reject the credibility of the appellant's narrative that he was and is a gay man. This was the central issue to be decided in the appeal and I am in no doubt, applying the considerations in E & R, that this mistake of fact amounts to a material error of law.

Disposal

11. For the reasons given above in relation to ground three, I am satisfied that the decision of Judge Handler falls to be set aside as involving a material error of law. It follows that it is unnecessary to address my mind to the remaining grounds of appeal save to say that my preliminary view was that none of the other grounds were persuasive on their face although I recognise that Mr Wood did not have the opportunity to develop these arguments.

12. Mr Wood forcefully argued that the matter should be retained and remade in the Upper Tribunal. The foundation for this argument was that there was no good reason to interfere with the findings of Judge Handler at [31] where several of the points taken against the appellant's narrative of his early sexual awakening were rejected as lacking in substance. These were said to be findings which should have resulted in the asylum appeal being allowed without any need to consider the remainder of the appellant's narrative. This was a wholly unrealistic suggestion. Firstly, the parts of [31] I was invited to preserve cannot be

accurately described as findings of fact at all. There is a world of difference between the rejection of points taken against an appellant's credibility and a finding that the challenged parts of the narrative were accepted by the judge. Only the most strained readings of the decision could result in the conclusion that the judge should be taken to have accepted the early narrative, she simply declined to find that these accounts were tainted by inconsistency or lack of detail as the respondent contended. To preserve these nuanced and soft-edged observations and to discard the hard-edged findings of fact which emphatically rejected central planks of the later narrative would be a gross distortion of the fact-finding process.

13. The judge's fact-finding assessment cannot stand because an important part was built upon a false premise. I decline to engage in the unjustifiable selection of parts of the decision which, by a process of inference, are said to support the appellant's case to be a gay man. It is in the interests of justice for the fact-finding process to commence afresh. Notwithstanding the fact that this will be the second occasion on which the matter will be remitted, I am satisfied that the First-tier Tribunal is best equipped to hear from the multiple witnesses and determine the important factual matrix in this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. The First-tier Tribunal's decision is set aside, and the appeal is remitted to the First-tier Tribunal for consideration *de novo* by a judge other than Judge Handler or Judge McClure.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 September 2024