



Upper Tribunal a
(Immigration and Asylum Chamber)

Appeal Number: PA/04712/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 3 September 2018

Decision & Reasons Promulgated
On 18 September 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

M K A
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Vatish, Counsel instructed by JKR Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Housego promulgated on 4 May 2018 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 19 March 2018 refusing his protection and human rights claims.
2. The Appellant is a national of Bangladesh. The submissions made which led to this appeal are his third claim for asylum, the previous two having been treated as withdrawn when he absconded. His immigration chronology is set out in more detail at [3] of the Decision and I do not need to repeat it.
3. The Appellant’s protection claim on this occasion is that he is a homosexual who would be at risk on return to Bangladesh for that reason. Separately, he claims to be at risk due to a land dispute involving his uncle.
4. The Judge did not believe the Appellant’s claims. He found at [29] of the Decision that the Appellant is not of same sex orientation. He went on to find at [30] that even if he is gay, he would choose to live his life as a gay man discreetly as the Judge found he had in the UK. That was based on the Appellant having disclosed his sexuality, on his own case, only to a few people. For that reason, the Judge found that, even if the Appellant is gay, he would not be at risk on return to Bangladesh ([36]).
5. As the Judge pointed out at [37] of the Decision, the claim to be at risk on account of the land dispute could not give rise to a claim for asylum. There is no Convention reason disclosed by the claim. The Judge found that, in any event, the claim was not credible.
6. The Judge also rejected the Appellant’s claim on Article 8 grounds finding that any interference with his private life was outweighed by the public interest.
7. When granting permission, First-tier Tribunal Judge C A Parker extended time for the appeal which was only out of time by a matter of days. She went on to find an arguable error of law for the following reasons:

“... The grounds allege that the Judge has failed to apply the correct standard of proof. The Judge erred in para 36 by stating that, if the appellant were gay, he would not be at risk on return to Bangladesh. The Judge’s suggestion that the appellant should live his life “discreetly” is not in accordance with the law. The Judge failed to place adequate weight on the consistency in the appellant’s account; that he left his home country in fear of his life; struggled to live discreetly and obtained evidence in support. The Judge was in error in stating that it would be relatively easy for the appellant to obtain documentary evidence of his fear of his uncle. The Judge did not properly assess the risk upon return or under Article 8.

I have carefully considered the decision. Although the judge refers to the correct (lower) standard of proof and relevant case law it is arguable that the wrong standard was applied. The Judge rejects some evidence without providing reasons and arguably, thereby, applied the wrong standard of proof. Screenshots and photographs submitted run from p43 to p85 of the appellant's bundle and appear to have been taken at different venues. The Judge largely rejects them for want of witness corroboration but had earlier refused the unrepresented appellant's adjournment application so that he could call witnesses. The Judge does not appear to have taken into account the lack of opportunity to fabricate such evidence to support a claim that was made after being arrested or the difficulties of preparing an appeal in detention.

The Judge further referred to the failure of the appellant's claimed partner to attend and made adverse findings. However, he had refused an adjournment for the witness to attend. It would appear from the decision that they were only in a relationship from mid-September 2017 (the appellant was detained on 5 January 2018). The Judge was told that this person had been granted asylum on the basis that he was homosexual and further refers to the relationship having "cooled". In assessing the failure of this, and other, witnesses to attend, the Judge arguably applied the wrong standard of proof. Elsewhere, the Judge makes findings of credibility without arguably, providing adequate reasons. For example, he stated that it was "not convincing" that the appellant would have lent his phone to another because that person had run out of credit but gave no reasons for finding this explanation unconvincing. The Judge relies significantly upon the late disclosure of his sexuality, and states (at para 27) that there was "no reason" not to tell his solicitor of his fear previously and noted that his representative was from the same cultural background which would make it easier for the appellant to disclose. The Judge's finding was arguably in error, as there is no indication on the face of the decision that this issue was explored with the appellant and makes assumptions about the appellant's relationship with his solicitor.

The Judge makes several references to the appellant, if he were gay, having lived discreetly in the United Kingdom but does not identify the evidence upon which that finding is made. This is a significant finding of fact in the context of this claim and was arguably made in error. The photographs in the appellant's bundle contain captions including "after clubbing with a gay friend"; "Reading Pride"; at "meetings of ELOP" (a gay centre) and "with a member of the Bengali LGBT organisation" and the Judge has placed no weight upon them or addressed their relevance to the issue of discretion. The Judge placed no weight on the appellant's claimed sexuality when considering Article 8 which is consistent with the adverse credibility findings. There are a number of arguable errors of law in the decision. Permission to appeal is granted."

8. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

9. There is no merit to the ground that the Judge has applied the wrong burden and standard of proof. The legal tests relevant to this appeal are clearly stated at [6] to [4] of the Decision (something has gone awry with the numbering at [13] of the Decision). Thereafter, those tests are applied. Insofar as the grounds take issue with the Decision on specific issues, those are more appropriately categorised as either a failure to give reasons, a failure to take into account relevant evidence or failure to give appropriate

weight to various pieces of evidence. The Judge has applied the correct standard to the two claimed risks at [29] and [36] of the Decision.

10. I can deal very shortly with the ground relating to the claim to be at risk due to the land dispute with his uncle (fourth bullet point of the grounds). It is suggested that the Judge has wrongly required the Appellant to provide documents to corroborate this aspect of his claim. However, the Judge says at [27] of the Decision that “[t]he appellant said in 2013 that he had documents to submit about the land dispute but 5 years later had still not obtained them.” The Judge has provided reasons for rejecting this aspect of the Appellant’s claim at [37] as follows:

“... This is not credible as an account. Even if it was true, there is no reason for the uncle to harm the appellant. The appellant states that the uncle now has full legal title to the land. The appellant says that the uncle owns it by the law of Bangladesh. He is, according to the appellant, powerful as holding a position in the Awami League. The appellant said that if he returned, even if he told the uncle that he was not going to challenge the ownership by the uncle of the land, the uncle would not believe him and would harm him as a result. This is highly implausible, as the uncle is said to be powerful, the appellant not, and as the appellant says that the Courts and authorities will not support him there is no reason why the uncle should have the slightest fear that the appellant would be able to try, or to succeed in taking the land back.”

11. The reasons given by the Judge are adequate, particularly in the context of a claim made without any documents in circumstances where the Appellant had said five years previously that he could get documents to corroborate this claim and had still failed to do so.
12. I can also deal very shortly with the grounds challenging the conclusions relating to Article 8 ECHR. The grounds simply state at the seventh and eighth bullet point that “Article 8 of the Human Rights Act 1998 the Appellant’s right to a private life are not in line with established case law (Huang)” and “The Appellant further seeks consideration of his Article 8 Claim relying on ‘the right approach in the observations of Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 1 A C 167”. Not only do those grounds not make much sense grammatically but they also fail to identify what error of law is said to have been made by the Judge in this regard. The Judge considered Article 8 at [39] of the Decision, identified that the Appellant could rely only on his private life and took into account the factors relevant to that private life and the public interest. As the Judge concluded having set out the factors “[t]he *Hesham Ali* balance sheet has nothing to put in it for the appellant and has the strong public interest in maintaining effective immigration control on the other side, and the other factors in S117B”. The Judge was there assessing the proportionality of the interference against the public interest. That is consistent with the case law (to which the Judge refers at [39]).
13. I note that Judge Parker has granted permission on Article 8 on the basis that it may be affected by any error in relation to the protection claim based on the Appellants’ homosexuality claim. I will return to this aspect, if the need arises, having considered whether errors exist in that regard.

14. I turn then to the issues on which Ms Vatish (sensibly) focussed her attention, namely the errors which she says are evident in relation to the Judge's consideration of the Appellant's claim to be gay. I can say immediately (and as Mr Bramble conceded) that if the Judge had found the Appellant to be credible in his claim to be homosexual, the ground relating to risk on return may well be a strong one, depending on what the evidence shows as to the Appellant living his life discreetly. However, any error in relation to the risk which arises for a homosexual on return to Bangladesh and whether the Appellant would wish to live as a gay man openly there can only be material if the Judge was not entitled to reach his primary finding at [29] of the Decision that "[t]o the required lower standard the appellant has not shown that he is of same sex orientation". It is therefore on that finding which I concentrate first.
15. The grounds challenging this finding lack specificity. The premise for the second and fifth bullet points ignore this primary finding and assume that the Judge has accepted that the Appellant is credible in this regard (which he has not). The third bullet point asserts that the Appellant has been consistent in his account. That is not of course the case in relation to this element of the claim since his failure to mention his sexuality in either of the two previous claims is one of the reasons why he was not believed. The only bullet point which therefore challenges the Judge's findings in this regard is the first bullet point which asserts that the Judge has adopted the wrong standard of proof to the higher standard. I have explained why I do not accept that this is the case but, in light of the grant of permission on this basis by Judge Parker which expands on what she understands by this ground, it is appropriate for me to address this aspect of the challenge by reference to that grant of permission.
16. The Appellant appeared in person at the hearing. He sought an adjournment on the basis that he was unwell ([12]). The Judge refused that request for the reasons given at [13] of the Decision. Contrary to what was suggested by Ms Vatish, it does not appear from what is said at [17] of the Decision that the Appellant sought an adjournment in order to call particular witnesses. He merely indicated after the adjournment had been refused that he could arrange for two witnesses to attend if the case was adjourned. He does not say who they are or what their evidence would add to his case. I appreciate that the Appellant was at that stage in person but even at the hearing before me, there was no statement from the Appellant setting out who those witnesses would be or what their evidence could add. Nor is there any statement from any further witness. The Appellant has been represented since at least May 2018. He was represented when the appeal was originally lodged. There is nothing to explain why statements have not been or were not previously obtained from any witnesses who could corroborate the Appellant's claim.
17. When she granted permission, Judge Parker appears to have thought that it was arguable that there was an inconsistency between on the one hand the Judge refusing to adjourn to allow the Appellant to call further witnesses and on the other refusing to accept that the Appellant had been in a relationship with [JA] who it is said could have attended to give evidence if the hearing were adjourned. The answer to that argument is what is said at [27] that the Appellant reported that he had asked [JA] to attend the hearing two weeks previously but [JA] had refused saying that "he was busy".

18. For the above reasons, and particularly given the lack of any further particulars as to what evidence would have been called if the hearing had been adjourned to allow the Appellant to get further witnesses, I am satisfied that there was no procedural unfairness in relation to the hearing (which is not in any event particularised in the Appellant's grounds of challenge to the Decision).
19. I turn to consider the issue of the delay in claiming asylum on this basis. As I have already observed, this is the Appellant's third claim and his sexuality has not been raised on either of the previous two occasions. It is suggested in the grant of permission and by Ms Vatish in oral submissions that the Judge should have explored with the Appellant why he had not claimed previously. However, that ignores that the delay in making the claim had already been raised and explored by the Respondent. What is said in the Respondent's decision letter is as follows:

"[59] You claimed asylum and sought to remain on the basis of your human rights on 10/01/2018 and detained after arrested under an immigration provision by Wiltshire Police for working illegally. When you were asked why you did not make a claim prior to your arrests, you stated that you absconded previously in 2013 without pursuing your asylum claim because you were scared you would be sent back to Bangladesh and you did not make a claim based on your sexuality because '[a]fter my mother became aware of my sexuality, from 2016 I was thinking of applying for asylum and to do so I took advice from my solicitor but was wrongly advised. They said I had to put further submissions and Subject Access Request to the Home Office for my old documents. Because of that I was waiting' [AIR 126]"
20. The Appellant also had the opportunity to explain the delay in his witness statement which he did at [10] where he says that, in 2013 when legally represented, he "did not see the purpose of discussing my personal life as I did not know that homosexuality was a reason to claim asylum." That explanation may be somewhat inconsistent with what was said in his asylum interview as recorded in the Respondent's letter but in any event, what both explanations show is that the Appellant had ample opportunity to explain the delay and there was no obligation on the Judge to explore this with the Appellant further. Nonetheless, Judge Housego does consider at the second bullet point of [27] of the Decision whether there might be another explanation for the delay. There was no need for him to go further. There has been no application to adduce any further evidence from the Appellant to explain why he did not make this claim sooner.
21. It is suggested that the Judge has rejected the screenshots and photographs for want of witness corroboration. It is the case that the Judge refers at [27] to "the otherwise total absence of evidence from the other individuals said to be involved with the appellant". As a matter of fact, that is accurate. In any event, the Judge goes on to say that "when set holistically against the credibility issues in the case of the appellant, set out below", the photographs and screenshots do not overcome the lack of evidence from other sources.
22. It is suggested by Judge Parker that the photographs may have probative value because the captions show that they were taken "at different venues". That may or may not be the case. None are dated. The captions are added in manuscript. Those

captions may or may not be an accurate description of what the photographs are supposed to show. For example, the photograph said to have been taken “in Reading Pride” at [AB/78] shows the Appellant with another male in front of a Labour Party banner. That does not mean that it was not being carried at that event. However, the photographs taken alone are not necessarily proof of what the Appellant says they show or his attendance at the events which the Appellant claims without more. Even if they are, attendance at a Gay Pride event or going to a Gay Club does not prove that the Appellant is himself gay (as opposed to, for example, having gay friends). The Judge was therefore entitled to take into account that those persons shown on the photographs had not provided evidence even in the form of a witness statement.

23. There are some quite explicit text messages appearing at [AB/43 – 63]. It is not clear to me how those are said to be connected to the Appellant. There is nothing which obviously shows that they appear on his phone on the face of the documents. The documents are of poor quality. Again, the caption stating that they are a conversation between the Appellant and a [KG] is added in manuscript by the Appellant himself. Without more, those are not of themselves probative as the Judge found.
24. Neither is there corroborative evidence from other organisations to which the Appellant suggests in the photographs that he is affiliated. He says for example in the captions that he is at a meeting at “ELOP” which he says is a gay centre. He has provided a website printout for that organisation and their Charity Commission registration document. However, even accepting as I do, that the evidence shows that ELOP is a gay centre, that does not corroborate the Appellant’s link with that centre. There is what is said to be an e-mail exchange with “ELOP” at [AB/86-91] which suggests that the Appellant has been in communication with that organisation from time to time to try to book attendance at meetings and has occasionally succeeded in booking a session but there is nothing from the organisation to confirm his links with them. Similarly, although the membership card which is in the Home Office bundle (although not apparently in the Appellant’s bundle) suggests that the Appellant may have joined ELOP, that does not in and of itself demonstrate that he is gay.
25. As the Judge said at [27] of the Decision, the documentary evidence such as it is had to be assessed in the round with the other evidence including the Appellant’s credibility. The Judge’s findings in that regard are at the sixth to twelfth bullet points at [27] of the Decision as follows:

“... When that was put to him he said that he was waiting for the documents but before they could arrive he was caught. This compounds the credibility issue, because it is inherently implausible, he did not say what documents it was he was awaiting, and he still has not produced any, or explained what they were or why he cannot get them. He continued to maintain that the documents were not available to him, without being able to specify what they were.

 - The 2013 letter from his solicitor said that both parents had died, but today that his mother is alive still. He blamed the solicitor for this mistake but did not complain and I do not accept this explanation, applying BT (Former solicitors’ alleged misconduct) Nepal [2004] UKIAT 00311. He submitted false information with his earlier claims and that adversely affects his credibility.

- The appellant's denial that he was working when arrested lacks credibility. He said that he was sleeping in the flat above the restaurant when the enforcement visit occurred, and that the owner was a distant relation who let him live there without working. This is so improbable that it goes to credibility, especially as the appellant accepted that he was working to support himself.
- In the asylum interview the claimant said that he had a partner, [J A], with whom he was on good terms from 09 September 2017 to when he was arrested and detained, that [J A] had been granted asylum as gay, and that he had [J A]'s phone number. No one came to give evidence for the appellant. The appellant said that he had spoken to [J A] and told him of the hearing 2 weeks ago and asked him to attend but [J A] had said "*he was busy*". He had not asked what [J A] was doing. That person had no reason not to give evidence, being secure in his immigration status, and the account of the appellant was that they had a sexual relationship right up until the appellant was arrested and detained. There was no reason advanced as to why the relationship had cooled and evidence from [J A] would have been to the advantage of [J A] (if the account was reasonably likely to be true) as it could lead to the release of the person with whom he was having a sexual relationship.
- The account of the appellant as to how people in his village knew he was gay was wholly incredible. It was not incredible that the appellant should be put in touch with someone else from his small (1,000) people village, through Facebook, and meet up. What was incredible was that the appellant should arrange to meet this person, only for a social chat, at a hotel where he had booked a room to spend time with a male partner. At the same time his evidence was that he was very afraid of anyone from his village getting to know he was gay. Yet he says he invited his neighbour for a social chat at the hotel where he was to see a male lover. It is not credible.
- His explanation, that the person from his home village would assume that he was living at the hotel did not alleviate the credibility issues but deepened them, given its implausibility. Nor was it credible that he would lend his phone to the person from the village to use when it contained photographs of him which he said showed him engaging in homosexual activity while he went off to the toilet. Nor was the explanation convincing that the reason the phone was used was because the person from the village had run out of credit. Nor were the photographs said to have been seen by the person from the village produced.
- The appellant was asked where the hotel was, and said in Stratford, East London. He had not mentioned hotels with partners other than in Swindon. The explanation for that inconsistency that this was only a casual partner was not credible..."

26. Those are all reasons on which the Judge was entitled to place reliance when assessing the Appellant's own credibility. Criticism is made of the finding that it was not credible that the Appellant would lend someone his phone because the person had run out of credit. The point though is not the plausibility that a person might lend another a phone because someone has no credit on their phone but, as the Judge makes clear "...it was not credible that [the Appellant] would lend his phone to the person from the village to use when it contained photographs of him which he said showed him engaging in homosexual activity while he went off to the toilet". Nor as the Judge says

in the previous bullet point is it credible that the Appellant would arrange a social meeting with a person from his village at a hotel where he said he had booked a room to spend time with his male partner. The Judge also noted a discrepancy between the Appellant's evidence as to the location of the hotel he used. The Judge did not accept the Appellant's attempt to explain this discrepancy.

27. It is for the Judge to give the weight he considers appropriate to evidence, provided he gives reasons for so doing, does not ignore other evidence and reaches findings which are not perverse.
28. The Judge provided ample reasons at [27] of the Decision for rejecting the Appellant's claim to be a homosexual. In so doing, he took into account the evidence before him. He was entitled not to give the photographs, screenshots and other evidence (which was limited in any event) weight and, when taken holistically with the Appellant's lack of credibility, not to accept that evidence as corroborative of the Appellant's account.
29. It follows from the above that I am not satisfied that there is any error in the Judge's conclusion that the Appellant "has not shown he is of same sex orientation". Given that the primary finding stands, there is no need to go on to consider what the Judge says about how the Appellant would choose to live on return to Bangladesh or the risk which he might face if he were gay. He has been found not to be credible in his account.
30. For the foregoing reasons, the Appellant has not shown that there is any material error of law in the Decision. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not involve the making of a material error on a point of law. I uphold the Decision of First-tier Tribunal Judge John Housego promulgated on 4 May 2018 with the consequence that the Appellant's appeal remains dismissed.

Signed
Upper Tribunal Judge Smith



Dated: 17 September 2018