



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00974/2018

THE IMMIGRATION ACTS

Heard at Fox Court

On 13th February 2019

**Decision & Reasons
Promulgated**

On 7th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**D K
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy, instructed by Sunrise Solicitors

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

DECISION AND REASONS

1. The Appellant, a national of Albania, appealed to the First-tier Tribunal against a decision of the Secretary of State of 21st December 2017 to refuse his application for protection in the UK. First-tier Tribunal Judge Burnett dismissed his appeal in a decision promulgated on 3rd October

2018 and the Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Rintoul on 11th January 2019.

2. Three grounds of appeal are put forward on the Appellant's behalf. It is contended in the first ground that the judge erred in failing to make clear findings in relation to the Appellant's claimed sexuality. It is contended in the second ground that the judge fell into error in his consideration of the Appellant's account of past sexual encounters. The third ground contends that the judge erred in relying upon the Appellant's late disclosure of his claimed sexual identity as undermining his credibility. It is further contended that none of the errors identified are rendered immaterial by the judge's conclusion that the Appellant would be able to negate any risk via internal relocation or obtaining a sufficiency of protection because it is contended that neither are conclusive of any question as to whether the Appellant is entitled to international protection. In these circumstances it is contended that any determinative assessment of those issues would need to be made on the basis of clear findings as to the Appellant's sexuality.
3. Having considered the evidence the judge found at paragraph 61 "I conclude that the Appellant is not open in the UK as he is still exploring his sexual identity and who he is". At paragraph 66 the judge concluded "that the appellant is not open about his sexuality because he is unsure about his sexual identity not because he fears any persecution." And at paragraph 67 the judge again reiterated that the Appellant "is still exploring his sexuality and is not comfortable expressing himself as a gay man". The judge concluded that this reticence "is not due to a fear of persecution or serious harm".
4. It was accepted by Mr Walker at the hearing before me that the judge erred in failing to make definitive findings on this matter.
5. Both parties agreed that it was not the case before the judge that the Appellant was exploring his sexuality identity. It is clear from the papers before me, as confirmed by the parties, that the case put to the judge was that the Appellant is gay. The judge erred in failing to make a clear finding on this matter which goes to the heart of the Appellant's asylum claim. Had the judge concluded that the Appellant had not established this key part of his claim it was open to him to reach reasoned conclusions that he was not satisfied that the Appellant had demonstrated this. However, instead the judge made open findings which neither completely accept nor completely reject this part of the Appellant's claim.
6. The judge failed to make clear findings on a matter that is central to the Appellant's claim. This is a material error and I set the decision aside in its entirety.
7. I agree with the view of both parties that, in light of the Presidential Practice Statements the nature or extent of the judicial fact finding which is necessary for the decision in the appeal to be re-made is such that,

having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the asylum appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

The appeal is remitted to the First-tier Tribunal to be considered afresh.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 5th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is payable and therefore there can be no fee award.

Signed

Date: 5th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes