Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01041/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2019	**On 9 August 2019**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MMA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Reza, Solicitor with JKR Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge Swinnerton of the First-tier Tribunal promulgated on 26 April 2019 dismissing the appellant's appeal against a decision of the respondent dated 21 January 2019 to refuse his asylum and humanitarian protection claim.

2. The appellant is a citizen of Bangladesh born on 16 January 1980. He claims that he cannot return to Bangladesh on account of his homosexuality, on the basis that he will either be persecuted for his open

expression of his sexual orientation, or that he will be compelled to live a discreet life in conflict with his true sexual identity.

Decision of the First-tier Tribunal

3. Judge Swinnerton found that the appellant had not given a truthful and accurate account of his claimed sexuality and rejected the element of the account that he was gay. As such the judge considered that the appellant would not suffer persecution upon his return to Bangladesh. The judge reached these findings having heard from the appellant, his aunt, Mrs H, and a friend of the appellant, Mr O. The judge noted that there were a number of witness statements in the appellant's bundle provided by witnesses who had not attended the Tribunal. The judge had concerns about the internal consistency of the appellant's account. He said that he was "troubled" by the point in time at which the appellant said that he had started to live an openly gay life in the United Kingdom. His evidence was that he had first declared his homosexuality to Mrs H in July 2015, and that that was about the point at which he started to live an openly gay life, and informed his aunt, Mrs H. Slightly earlier in the year, in May, the appellant began a relationship with a man called Mr M. The judge ascribed significance to the fact that the appellant's aunt, in whom the appellant confided regularly, had never met Mr M, had not heard of him and had no knowledge of him at all. This was despite the fact that the revelation by the appellant of his homosexuality to Mrs H coincided, in broad terms, with the beginning of his relationship with Mr M, and in light of the role Mrs H performed as his confidante and mediator with the rest of the family. As such, the fact that Mrs H lacked any significant degree of knowledge about his relationship with Mr M presented credibility concerns.

4. At [21] the judge had some further credibility concerns with the omission of what he considered to be key aspects of Mrs H's evidence. A central tenet of the appellant's case was that he would suffer persecution at the hands of his family in Bangladesh, given that they knew of his homosexuality. Mrs H had provided a statement in which she described trying to reason with the appellant's family in Bangladesh. She had sought to urge them to accept him. Her statement said that her visit to Bangladesh was a "recent" one and in oral evidence she clarified that that visit took place in February 2019. In her oral evidence, Mrs H mentioned for the first time a visit she claimed to have made to Bangladesh in 2016 or 2017 in which she discussed the appellant's homosexuality with his mother. The judge had credibility concerns over the absence of any references in her statement prepared for the proceedings concerning the 2016 or 2017 visits. The judge noted the appellant placed significant weight on the reaction to Mrs H revealing his homosexuality to the wider family. As such, considered the judge, the visits by Mrs H in 2016 or 17 to Bangladesh entailed what must have been, even on the appellant's account, a very significant meeting at a significant point in time for Mrs H, for the wider family and of course for the appellant himself. However, due to the fact that Mrs H did not mention that visit or those family meetings in

her witness statement, the judge had credibility concerns. This was of particular concern for the judge, given the critical role played by Mrs H in the overall narrative provided by the appellant.

5. The appellant previously held leave to remain in this country as a student, although that had been curtailed in February 2015. The judge did not accept the appellant's explanation for having waited until September 2017 upon being arrested for immigration offences to make his claim for asylum. The explanation given by the appellant as outlined at [22] was that the appellant had been told by a friend not to claim asylum as he would otherwise be sent back to Bangladesh. The judge found that explanation to lack credibility and said that he did not see any reason why the appellant could not claim asylum at an earlier stage.

6. Turning to the appellant's narrative of what has taken place in this county since he started to live an openly homosexual life, at [23] the judge said that it was significant that Mr M had not provided a letter of support or any form of statement for the purposes of the hearing. Although the appellant claimed to have had between 20 to 25 casual sexual relationships, only one of those individuals, Mr O, had attended the hearing and his evidence was that he had had casual sex with the appellant on four occasions since 2017. The judge was concerned that Mr O only knew the appellant within the confines of the clubs where they had met, and that he knew very little about his family and his wider circumstances. The judge rejected the explanation that Mr O provided for why he was unable to see the appellant on further occasions, namely that he worked for 60 hours each week. He considered that that explanation lacked credibility. The judge could not see why working 60 hours weekly would prevent the appellant from seeing Mr O. That was one of the factors that led the judge to conclude that there had been very little by way of evidence concerning the appellant's claimed homosexual activity in the United Kingdom.

Permission to appeal

7. Permission to appeal was granted by a Deputy Upper Tribunal Judge on the basis that it was, "arguable (just) that the First-tier Tribunal Judge erred in his treatment of the evidence of the supporting witnesses and that his findings lacked clarity". The grounds for appeal also criticised the judge's treatment of what he perceived to be the delay in the appellant's claim for asylum, although the permission decision did not consider that aspect of the permission application. Equally, the permission decision did not restrict the grounds on which this appeal could be argued. As such Mr Reza legitimately pursued the point before me.

Discussion

8. In the recently reported case of Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC), Upper Tribunal Judge Gill held the following at (iii) of the headnote:

> "Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not 'sufficiently consider' or 'sufficiently analyse' certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material."

It appears that that reported case had not been published by the time the Deputy Judge granted permission to appeal in the present matter, so I am without the benefit of the necessary detailed analysis as to "precisely" why permission was granted on the grounds that "insufficient weight" had been given to certain aspects of the evidence.

Submissions

9. In order to expand on the grant of permission, it is necessary to turn to the grounds. The appellant originally attended the Tribunal on two earlier occasions with the three additional witnesses who did not attend by the time the substantive hearing took place. On the first occasion the matter was listed before the First-tier, the appellant unfortunately became ill in court and the matter had to be adjourned. On the second occasion, the judge became ill and the matter was adjourned again. On those first two occasions the appellant was prepared to give evidence with a total of five supporting witnesses.

10. By the time the matter finally reached the substantive hearing before Judge Swinnerton, three of the witnesses who previously attended on those first two occasions were now unable to attend. One of those witnesses was the appellant's cousin P, a friend of his who was also gay, S, and a Bangladeshi gay rights activist, MK. The appellant applied for a further adjournment on that occasion. That application was rejected and no part of the grounds advanced before me or upon which permission to appeal was obtained seek to challenge the judge's decision to refuse to adjourn the matter on that occasion.

11. It is against that background that Mr Reza contends that the judge failed to make "sufficient" findings concerning the three absent witnesses. Although they did not attend to give oral evidence, submits Mr Reza, each had provided a written statement or a letter and the judge did not engage with the contents of those documents in sufficient depth. The remainder of Mr Reza's arguments relate to the analysis conducted by the judge in relation to the facts.

12. Mr Tarlow submits that the judge reached findings of fact he was entitled to reach, and that the grounds of appeal disclose no material error of law.

Discussion

13. As Mr Reza accepted in oral argument, in order to challenge a decision on the basis of a material error of fact it is necessary to demonstrate that the judge below reached a finding that was irrational, perverse or not open to him or her on the facts or evidence before the court (R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]). Failure to give adequate reasons can be a basis upon which a decision can feature a material error of law, but only if the inadequate reasoning or the weight ascribed to the immaterial matters or the lack of weight ascribed to material matters renders the decision perverse or irrational. This represents the established legal position that there may not be an appeal to this Tribunal on a point of fact but only on a point of law.

14. Turning to the submissions advanced in relation to the evidence of Mrs H, I do not consider the judge's analysis to have been irrational or to have led to a perverse conclusion. In her statement Mrs H wrote that she was quite well-known within the Bangladeshi community and that although she knew about the appellant and his sexuality and was prepared to tolerate it, she did not endorse it. She wrote this:

> "As a result I never have met with any of [the appellant's] boyfriends. He did tell me that he has boyfriends with whom he visits different clubs. However, I was never interested to talk about it much".

15. The submission by Mr Reza is that the judge reached an irrational conclusion by ascribing significance to the fact that in her evidence, Mrs H said that she knew very little about any of the appellant's boyfriends. She had addressed her lack of knowledge, submitted Mr Reza, by stating that she tolerated the appellant's homosexuality, but did not want to find out the details. I do not consider that to have been an irrational conclusion on the part of the judge. The judge found that the role that Mrs H played in relation to the appellant was that of a confidante, and, accordingly, he had credibility concerns over the lack of her knowledge of any detail concerning the appellant's relationships. The judge's findings that it would have been reasonable for Mrs H to note some more of the detail about his relationships was a finding that was open to the judge to reach, especially in light of Mrs H's evidence that she had performed something of a mediator role on behalf of the appellant in relation to his wider family in Bangladesh and that she had urged the family to accept him. As such, the judge rightly noted that, given the relationship that the appellant had with Mrs H and her wider role in relation to the extended family, he would have expected Mrs H to have known more about the details of the relationships which lay at the heart of the appellant's newly openly homosexual lifestyle. Another judge may have approached their treatment of Mrs H's evidence differently, but nothing about the treatment of Mrs H's evidence by this judge featured any perversity or led to an irrational conclusion.

16. Mr Reza submits that Mrs H's earlier visits to Bangladesh that were not mentioned in her statement were not concealed from the Tribunal. He submits that her evidence featured no contradictions. She made no attempt to hide information in her oral evidence, he submits; it was simply the case that she expanded upon her written statement orally, revealing that she had visited Bangladesh on an additional occasion to that described in her statement. I do not consider this to have been a finding that was not open to the judge to reach. His finding that, were it the case that the family had reacted in the way the appellant claimed, and had Mrs H assumed the conciliatory and mediatory role which she said she did, she would have provided more detail was rational. It was a finding that was open to the judge to reach on the evidence.

17. In relation to the appellant's relationship with Mr O, his casual partner he claimed to have met in a club, nothing about the judge's treatment of this aspect of the evidence features any irrationality or perversity. It is necessary to step back and examine the nature of the case advanced by the appellant as a whole. The appellant claims to have had a serious relationship with Mr M and around 20 to 25 casual sexual relationships with other men. The judge was legitimately concerned that the evidence presented to the Tribunal was limited in comparison. Mr O's evidence was limited to a discreet number of interactions in the context of a club. Mr Reza is, of course, right to say there is no legal requirement for relationships to take place outside such confines. However, it must also be acknowledged that there is no rule of law preventing a judge from rejecting such evidence in these circumstances. The nature of the judge's credibility concerns on this occasion related to the relative lack of depth of the evidence advanced on behalf of the appellant in contrast to the breadth of the basis of his claim. The limited context of the interactions that the appellant claims to have had with the only witness who was able to support his claimed homosexuality from a practical perspective must therefore be viewed against that background. Again, another judge may have approached this assessment of the facts differently, but there is nothing about the approach adopted by this judge that features the necessary irrationality or perversity which the appellant must establish in order to succeed in this appeal.

18. In relation to Mr M, the appellant's claimed long-term partner from whom he has since separated, Mr Reza contends that the judge unreasonably expected some form of statement or letter confirming the relationship to have taken place. Mr Reza contends that such an explanation was unreasonable in light of the fact the relationship had ended and the appellant was no longer in contact with him. With respect to Mr Reza, that is another disagreement with a finding of fact reached by the judge which was properly open to him to reach. The appellant's evidence had not been that the relationship ended acrimoniously, but that Mr M had moved to another city and he had lost touch. The underlying concern of the judge was that there was no supporting evidence of the sort one could reasonably be expected to be generated by a relationship of some length

in this country. While another judge may have approached his analysis of Mr M's evidence differently, it is necessary to recall that the judge conducted his assessment of the evidence in the case in the round. At [19] the judge specifically underlined the fact he had considered the entirety of the evidence in the case to the lower standard before reaching his decision. As such the judge's findings in relation to Mr M must be placed in the context of his wider analysis of the case as a whole. The concerns that the judge had had (as set out at [24] when he drew the various strands of the evidence together) were that there was an overall absence of evidence demonstrating that the appellant had satisfied the judge to the lower standard that he was gay.

19. In relation to the three witnesses who were unable to attend the judge was entitled to place less weight on their evidence given they were unable to attend the Tribunal. I accept that they had attended the Tribunal on previous occasions, but the fact that they did so previously did not bind the judge to accept their evidence in written form at face value on a later occasion when they did not attend. Had they attended, credibility assessments would have been required of their evidence in any event. The judge noted at [15] that Mr Reza had relied upon the witness statements of Mr H and Ms MK, and added at [19] that he had considered all the documentation that had been provided. It is trite law that it is not necessary for a judges of the First-tier Tribunal to consider in detail in their decisions every aspect of every piece of evidence. This Tribunal is seized with the task of assessing whether the judge in the First-tier Tribunal fell into a material error of law, not whether they recited each and every piece of evidence and expressly made findings upon it. Decisions of the First-tier Tribunal which are beset by unnecessary detail are not in the interests of justice. See Lord Justice Haddon-Cave in PA (Iran) v Secretary of State for the Home Department [2018] EWCA Civ 2495 at [42]:

> "There is an increasing tendency for First-Tier judgments to be overly long and to contain unnecessary detail. This can, itself, cause problems of consistency and cogency. Laborious recitation of every piece of evidence is not necessary or desirable and simply adds to the already heavy burden on First-Tier judges. It is only necessary to refer to evidence that is relevant to the issue or issues for determination. Length is no substitute for analysis."

20. The judge's analysis of the evidence of the absent witnesses must therefore be assessed by reference to his overall analysis of the entirety of the evidence of the case conducted in the round. In this respect, the judge had the benefit of hearing live evidence from the appellant, from Mrs H and from Mr O. The judge outlined legitimate credibility concerns surrounding the claimed lack of knowledge on the part of Mrs H, and the fact that she omitted key elements of the narrative that she advanced before him in her written witness statement. These were all findings which were properly open to the judge to reach and there is no material error of law in the means by which the judge reached those findings.

Delay

21. Mr Reza relied on the case of A, B and C v Staatssecretaris van Veiligheid en Justitie C-148/13 to C-150/13 of the Court of Justice of the European Union. Mr Reza's submission based is that it was improper for the judge to ascribe the significance that he did to the late claim in asylum advanced by the appellant, given the established difficulties that asylum seekers on grounds of sexual orientation experience. The relevant operative part of the reasoning of that judgment in the Court of Justice is at [4]. It states as follows, with emphasis added:

> "Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding in the context of that assessment the competent authorities from finding that the statements of the applicant for asylum lack credibility **merely** because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the grounds of persecution".

22. In response to this submission two observations are relevant.

23. First, the delay in the appellant claiming asylum was one factor of many credibility concerns which the judge had appellant's case. He had not reached his credibility findings "merely" because the appellant had delayed making his claim until his arrest in 2017 (see the added emphasis, above).

24. Secondly, the reasons given by the appellant for not claiming asylum did not relate to his perceived difficulties with coming out as a gay man against a strict Islamic background within the Bangladeshi community. At [22], the judge records the reasons given by the appellant for why he did not claim asylum earlier as being that he had been informed by a friend that if he were to claim asylum he would be returned to Bangladesh early, and that he had been unable to find a solicitor. At no part of the case advanced either before me or in submissions today, or as recorded by Judge Swinnerton below, had the appellant claimed that he had been unable to make his claim at an earlier stage due to difficulties arising from his cultural or Islamic background.

25. As such I find there is nothing in this aspect of the submissions made by Mr Reza which demonstrates that the findings of the judge below featured some material error of law in relation to the harm to the appellant's credibility arising from the delay in making the claim.

Conclusion

26. For these reasons the findings of Judge Swinnerton were open to him to reach on the evidence that he had received. I find that he gave sufficient reasons for rejecting the core of the account provided by the appellant and was entitled to reach that conclusion on the evidence that he had. This appeal is dismissed.

Anonymity

27. Judge Swinnerton made an order for anonymity and in light of the sensitive nature of the matters outlined in this decision, I consider it appropriate to maintain that order.

Notice of Decision

This appeal is dismissed. The decision of Judge Swinnerton stands.

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 his 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 2 August 2019

Upper Tribunal Judge Stephen Smith