



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-
000684
First-tier Tribunal No: PA/00549/2022
PA/55709/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd November 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Secretary of State for the Home Department

Appellant

and

QJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: No appearance by or on behalf of the respondent

Heard at Field House on 16 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent in the appeal before us is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to

identify the respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant in the appeal before us is the Secretary of State for the Home Department (“SSHHD”) and the respondent to this appeal is QJ. However, for ease of reference, in the course of this decision we adopt the parties’ status as it was before the FtT. Hereafter, we refer to QJ as the appellant, and the Secretary of State as the respondent.
2. The appellant is a national of Pakistan. He arrived in the United Kingdom in September 2014 with leave to enter as a Tier 4 student valid until 30 August 2015. Shortly after that leave expired, on 29 September 2015 the appellant applied for leave to remain on private life grounds. That application was refused, and six subsequent applications made by the appellant between December 2016 and August 2018 under the Immigration (European Economic Area) Regulations 2016 were also refused. The upshot of that immigration history is that the appellant has had no lawful leave to remain in the UK since 30 August 2015.
3. On 25 March 2019, the appellant claimed asylum on the grounds of his sexual orientation, as a gay man. The claim was refused by the respondent for reasons set out in a decision dated 25 October 2021.
4. The respondent referred to the appellant’s immigration history. The respondent accepted the appellant’s nationality but rejected the appellant’s claim that he is a gay man. She also rejected his account that when he told his father about his sexual identity in 2019, his father disowned him and said that he will kill the appellant if he returns to Pakistan. The respondent rejected the appellant’s claim that he will face problems from his family due to his sexual orientation. The respondent said she had concerns over the authenticity of screenshots relied upon by the appellant to evidence the conversation between him and his father. The respondent noted, *inter alia*, the screenshots appear to be formatted differently and featured different user interfaces as if they are captured on different devices. Some of the screenshots do not disclose the year in which the exchange of messages occurred. The respondent noted that screenshots of text messages are easily fabricated. The respondent referred to the appellant’s claim in interview that he had decided to tell his father about his sexual orientation in 2019 when he had exams and they did not go very well. He claimed he was thinking about his life and thought he could not go back to Pakistan because he wanted to study. He claimed he did not tell his father earlier because he was in a relationship and dating. The respondent claimed that was at odds with the exchange of ‘text messages’, in which the appellant had told his father about his sexual orientation because the appellant was asked when he was returning to Pakistan to get married. Having rejected the core of the appellant’s claims the respondent concluded the appellant will not be at risk upon return to Pakistan.

5. The appellant's appeal was listed for hearing remotely before the First-tier Tribunal on 18 January 2023. There was no appearance by or on behalf of the appellant. The respondent was represented by counsel. As the appellant had not joined the hearing the Tribunal clerk telephoned the appellant and was told that the appellant had not received the Notice of Hearing, and that he was ill with flu and cough. The appellant claimed that the notice of hearing was sent to an email address that was not his current email address. The appellant was sent the relevant link by email to the email address he provided so that he could join the hearing. It appears the Tribunal waited for the appellant between 10:30 and 12:30, but the appellant failed to join the hearing. When the Tribunal clerk telephoned the appellant again on multiple occasions, the calls went unanswered. For reasons that are neither apparent nor explained, it appears that counsel for the respondent invited the Tribunal to proceed with the hearing in the appellant's absence. The Judge did so, and allowed the appeal for reasons set out in a decision of Judge Knight promulgated on 25 January 2023.
6. The respondent claims Judge Knight gave undue weight to the written account of the appellant and supporting letters from friends, when they had all failed to attend the hearing of the appeal and their evidence could not be tested by cross-examination. The respondent claims that the appellant was aware of the hearing having been contacted by the Tribunal clerk on the morning of the hearing. The respondent also claims Judge Knight acknowledged that the respondent's claim that the authenticity of the screenshots cannot be substantiated, carries some weight. Judge Knight said at paragraph [66] that he is unable to place any weight on the screenshots, but then relied on that evidence to conclude that the appellant is a gay man. The respondent claims Judge Knight makes several criticisms of the respondent's decision, despite those matters not forming the basis of submissions made to the Tribunal by or on behalf of the appellant. Finally, the respondent claims judge Knight failed to have adequate regard to the burden of proof, which is on the appellant to prove his case.
7. Permission to appeal was granted by Upper Tribunal Judge Perkins on 5 October 2023 on all grounds.
8. There was no appearance by or on behalf of the appellant at the hearing before us when the matter was called on for hearing at 12:30pm. We are satisfied that the Notice of Hearing was sent by the Upper Tribunal, by post, to the appellant's address on 26 October 2023. We have no explanation for the appellant's absence, and we are satisfied that it is in the interests of justice for us to determine whether the decision of Judge Knight is vitiated by material errors of law, without undue delay.
9. Mr Parvar relied upon the grounds of appeal and a skeleton argument that has been filed by the respondent dated 8 November 2023. He submits the appellant had been provided an opportunity to join the remote hearing, but failed to do so. There was no application for an adjournment and the appellant made no genuine attempt to substantiate his claim. The appellant had failed to respond to the matters in the respondent's reasons

for refusal letter and in reaching his decision, the judge failed to have any regard to the fact that the appellant and his friends had failed to attend the hearing and submit to cross examination. The Judge failed to consider how that impacts upon his assessment of the credibility of the claim. Mr Parvar submits the judge made a number of unfair criticisms regarding matters set out in the reasons for refusal letter that remained unexplained by the appellant. There were inconsistencies in the account advanced by the appellant that required explanation and needed to be addressed. They were not because of the absence of the appellant.

Decision

10. At the conclusion of the hearing before us, we confirmed that we are satisfied that the decision of Judge Knight is vitiated by material errors of law and must be set aside. We said that we would set out the reasons for our decision in writing and that we now do.
11. We do not accept Judge Knight failed to have adequate regard to the relevant burden of proof, or that some of the criticisms made regarding matters set out in the respondent's decision are unduly unfair. We also reject the claim that Judge Knight said at paragraph [66] that he is unable to place any weight on the screenshots, but then relied on that evidence to conclude that the appellant is a gay man. However, this is an appeal in which the credibility of the appellant was very much an issue. The screenshots relied upon by the appellant went to the core of his claim that in 2019 he informed his father about his sexual orientation and was threatened. If, as he said, Judge Knight was unable to place any weight on that evidence, all he was left with was the appellant's own account.
12. In *A B & C v Staatssecretaris van Veiligheid en Justitie* C-148/13, C149/13 and C150/13, the European Court of Justice confirmed that when verifying an asylum seeker's claimed sexual orientation, Member States' freedom of action is constrained by the EU Charter of Fundamental Rights. The European Court of Justice said that the declaration made by an individual as to their sexual orientation is merely the starting point in the process of the assessment of the facts and circumstances. Although Member States have the right to verify the credibility of such claims, certain verification methods including intrusive questioning and requiring evidence of sexual activities were all incompatible with the Charter.
13. We are satisfied that there are matters in the respondent's refusal letter that required answers. The appellant failed to attend the hearing of the appeal to answer the concerns raised by the respondent that go to the core of his claim that he is a gay man, who has been threatened by his father and will be at risk upon return to Pakistan. The appellant did not submit to cross-examination and neither did his friends who had provided letters to support his claim attend the hearing. The burden, albeit to the lower standard, rests on the appellant. The absence of the appellant and his friends is a matter that we are satisfied Judge Knight failed to have adequate regard to when reaching his decision. He does not explain how the absence of the appellant and his failure to submit to cross-examination featured in his assessment of the credibility of the appellant. We

acknowledge that Judge Knight considered the appellant's claim to be internally consistent and consistent with background material but in our judgment, Judge Knight irrationally accepted the claims made by the appellant when the appellant's credibility was in issue, and the appellant did not attend the hearing so that his claims can be tested in cross-examination.

14. It follows that in our judgment, the decision of Judge Knight must be set aside with no findings preserved.
15. As to disposal, we have considered whether the proper course is to remit the appeal or to order that the decision be remade in the Upper Tribunal. In doing so, we have considered what was said in Begum (remaking or remittal) [2023] UKUT 46 (IAC). There may have been a perfectly good reason why the appellant had not joined the remote hearing before the First-tier Tribunal after he was contacted by the Tribunal Clerk. He had indicated that he was not feeling well when he was contacted. He should therefore have a proper opportunity to have his claim considered by the FtT. Given that the decision on the appeal needs to be taken afresh, and given the nature of the error into which the FtT fell, we have concluded that the just and proper course is to remit the appeal to the FtT for rehearing.

Notice of Decision

16. The decision of First-tier Tribunal Judge Knight promulgated on 25 January 2023 is set aside with no findings preserved.
17. The appeal is remitted to another judge of the First-tier Tribunal for hearing afresh.
18. The parties will be informed of a further hearing before the First-tier Tribunal in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 November 2023