



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/00259/2016**

Appeal Numbers:

PA/01484/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 4 October 2017

Promulgated

On 17 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) AH (INDIA)

**(2) MN (PAKISTAN)
(ANONYMITY DIRECTION MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms V Easty, Counsel instructed by Wimbledon Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Hodgkinson, sitting at Hatton Cross on 22 June 2017) dismissing their appeals against the separate decisions of the Secretary of State to refuse to recognise them as refugees on account of their claimed homosexual orientation. The First-tier Tribunal made an anonymity direction on the appellants' favour, and I consider it is appropriate that this anonymity direction be maintained for these proceedings in the Upper Tribunal.

Relevant Background

2. Both appellants arrived in the United Kingdom as students in 2010. On 14 August 2014, the first appellant (A1) was served with a notice of liability to removal, the respondent having concluded that he had used false educational documentation in order to obtain leave to remain through deception. On 2 October 2015 he claimed asylum, based upon his claimed homosexual relationship with the second appellant (A2).
3. A2 made an application for further leave to remain as a student on 6 February 2012, which was refused. On 25 September 2012 he applied for leave to remain as the spouse of "S", a woman whom he had married in the UK on 8 August 2012. Leave in that capacity was granted to him in 2013, valid until 27 September 2015. However, the marriage ended in divorce on 7 March 2014. A2 claimed asylum on 22 September 2015, based upon his claimed homosexuality and his claimed homosexual relationship with A1.
4. Refusal decisions were issued to A1 and A2 in February 2016. In summary, the respondent did not accept that either appellant was gay; and she rejected, as lacking credibility, their respective accounts of events, both in the UK and in their home countries, due to claimed inconsistencies in their evidence and to other issues of concern.

The Hearing before, and the Decision of, the First-tier Tribunal

5. The appellants' appeals came before Judge Hodgkinson by way of remittal from the Upper Tribunal, the previous decision of the First-tier Tribunal dismissing their appeals having been set aside on error of law grounds. Mr Sellwood of Counsel was instructed to appear on behalf of the appellants, and the respondent was represented by Mr Bassi, a Home Office Presenting Officer.
6. The Judge received oral evidence from the appellants and from two supporting witnesses: Mr B, who gave his evidence in Urdu (as did the appellants) and Mr W, who gave his evidence in English.
7. In his subsequent decision, Judge Hodgkinson set out the claims of each of the appellants at some length. They had met each other in the UK in 2012 and they initially became friends. Their relationship developed to the point where they became partners, although they never lived together due to their circumstances. They regularly met up and went out together: paragraph [29]. In 2014, A1 met Mr B, when playing cricket, and they became good friends. In about September/October 2014, A1 confided to Mr B about his sexuality. He had already seen the appellants eating together at his restaurant. In 2015, as A1 was having difficulties with his accommodation, Mr B allowed A1 to stay in his house with his family, where he continued to reside: paragraph [30].

8. A2 said that on 8 December 2011 he met A1 for the first time, at a house-party of a mutual friend, Mr W. Their relationship developed from there. At first, their relationship was not sexual, but they became more than just friends on 14 April 2012: paragraph [42].
9. In October 2013, A2 returned to Pakistan to hold discussions with his family, and the family of his wife, about their marriage. In December 2013, A2 returned to the UK. His relationship with his wife did not improve, and he did not try to improve it. The divorce was finalised on 7 March 2014. After his marriage had broken down, he got in contact with A1 again through Mr W about 1-2 months later. This was with a view to re-kindling his relationship with A1. Mr W arranged a meeting between the two appellants and they recommenced a friendship. Their relationship became sexual at the end of 2014 and their relationship became official on 14 February 2015: paragraphs [46]-[48].
10. The Judge set out his findings on the appellant's protection claims at paragraphs [59]-[117] of his subsequent decision (pages 12-25). He addressed the evidence of Mr W and Mr B at paragraphs [88]-[99] (pages 19-21).
11. He found Mr W's evidence was broadly consistent with, and supportive of, the nature of the claimed relationship between the appellants, and he said that he had given Mr W's evidence "*appropriate weight*": paragraph [94]. The Judge made adverse credibility findings on Mr B's evidence at paragraphs [98] and [99].
12. At paragraph [115], the Judge said that, having considered the totality of the available evidence, he found that both appellants had failed to establish that the material facts of their claims were credible or truthful. Both appellants had failed to establish that they were involved in a gay relationship with each other, or that they were gay men.

The Reasons for the Grant of Admission to Appeal

13. On 24 July 2017 First-tier Tribunal Judge Kelly granted permission to appeal for the following reasons:
 - (3) The majority of the issues raised in the first ground were simply a point-by-point traverse of the adequate reasons given by the Tribunal for finding that A1 and A2 were not credible witnesses and/or a disagreement with the Tribunal's record of their oral testimony unsupported by contradicting evidence from Counsel who attended the hearing. It is nevertheless arguable that having found the testimony of Mr W to be both credible and supportive "*of the nature of the claimed relationship with the appellants*", the Tribunal made an error of law by failing to explain why his testimony was not decisive of this issue in respect of the credibility of the appellants themselves. It is also argued that the Tribunal erred by drawing adverse conclusions in the absence of photographs depicting A1 and A2 acting intimately together. Permission to appeal on these two grounds (which apply equally to both appellants) is accordingly granted.

(4) It is not, however, arguable that the Tribunal erred by failing to have regard to the possible reasons for A1's failure to mention core aspects of his claim during his screening interview, given that he had not himself raised those reasons for consideration (paragraph 14 of the grounds). It is also not arguable that the matter raised at paragraph 17 of the grounds adds anything to the grounds considered at paragraph (3) above. Permission to appeal on these grounds is accordingly refused.

The Rule 24 Response

14. On 22 August 2017 Mr Melvin of the Specialist Appeals Team settled the Rule 24 response opposing the appeal. Judge Kelly clearly rejected the other grounds of appeal, and so what could be argued at the up-coming hearing was limited to what Judge Kelly had identified as being arguable grounds. In respect of the evidence of Mr W, it was incumbent on the Judge not to treat any single piece of evidence as determinative. While he found the evidence given by Mr W broadly consistent with that of the appellants, much of his evidence was told to him; and also Mr W had never seen the appellants behaving overtly sexually towards one another. The Judge had fairly treated the evidence of Mr W in the round, and his finding that the appellants were not in a gay relationship, and that neither of them were gay men, had been fully reasoned, and it was a conclusion that the Judge was entitled to reach.

The Hearing in the Upper Tribunal

15. At the hearing before me to determine whether an error law was made out, Ms Easty submitted that it was not open to the Judge to sit on the fence. The Judge had not given reasons for finding that the evidence of Mr W - and to a lesser extent, the evidence of Mr B - was not sufficient to establish that the appellants were a genuinely gay couple. The witness statement of Mr W was not in any of the bundles of documents in my file, and so I agreed with Ms Easty's proposal that she send a copy of the witness statement to me and Mr Tufan after the hearing, which she did. On behalf of the respondent, Mr Tufan adhered to the Rule 24 response settled by his colleague.

Discussion

16. In broad terms, the Judge did what he was supposed to do - which was to carefully weigh each significant piece of evidence, expressing a view on its probative value, before coming to a conclusion on the ultimate issue of whether the appellants had discharged the burden of proving, to the lower standard of proof, that each of them was genuinely homosexual and that they were together in a genuine homosexual relationship.

17. It is possible to envisage circumstances where the acceptance of the credibility of the evidence of a third party witness should lead inexorably to a finding in favour of the claimant, notwithstanding the claimant's own general lack of credibility. For example, if Mr W had given evidence that he himself had had a homosexual relationship with A1, and the Judge

accepted that his account was credible, it would have been perverse for the Judge not to find that A1 was homosexual, although not necessarily perverse not to accept that A1 was in a homosexual relationship with A2.

18. However, Mr W's evidence was not of such a stark nature. In his witness statement, he stated that he noticed that A1 and A2 "*started to get on really well*" at his house-party on 8 December 2011. He said that he was not aware of their particular relationship "*which I came to know at a later date*". He said that he came to know of the relationship when, at some point in 2012 after A2 had got married, A2 informed him of the relationship. A2 did not "*openly declare*" his relationship. Nor did A1. A2 told him that he had a relationship with A1, and he had not wanted to get married but had been forced to do so by the family.
19. Mr W said that, in around December 2012 or early 2013, A2 approached him with the view of contacting A1 for him to meet him. A1 refused to meet A2, without giving any reason. He came to know that A2 had divorced in 2014, and when they met, A2 told him about his relationship with A1, and asked him to inform A1 that he was now divorced and wished to meet up with him again. As far as he was aware, they were now in a relationship.
20. The Judge rehearsed the salient contents of Mr W's witness statement in paragraphs [89]-[92]. He observed, at paragraph [93], that his oral evidence was broadly consistent with the content of his witness statement and with the evidence of the appellants.
21. At paragraph [94], he said that the only specific concern raised by Mr Bassi regarding Mr W's evidence was that in cross-examination he had indicated that he had not socialised with the appellants since April 2016. Mr Bassi suggested that consequently Mr W could not know if the appellants were involved in a genuine, gay relationship. The Judge found this contention to have some arguable merit:

...bearing in mind that, by his own admission, Mr W had had no contact with the appellants since April 2016, [and] none of his evidence indicated that he had ever seen the appellants engaged in any overtly homosexual behaviour with each other.

22. The Judge continued:

That said, I accept that Mr W's evidence is broadly supportive of the nature of the claimed relationship between the appellants and I have taken that fact into account *alongside the balance of the evidence* (my emphasis).

23. It is pleaded in the grounds of appeal that Mr W's evidence was highly probative, and since the Judge found that it was credible, the only possible conclusion was that his evidence should have been accepted as being decisive.
24. However, while Mr W's evidence was corroborative of the claimed relationship, as the Judge acknowledged, it was nonetheless open to the

Judge not to attach decisive weight to it, having regard to its nuanced nature and also having regard to all the other evidence. In particular, it was open to the Judge to attach weight to the fact that Mr W had not seen them engaged in overtly homosexual behaviour with each other.

25. Ms Easty submitted that the Judge needed to give reasons as to why Mr W's evidence was not decisive. I consider that the reasons why not are tolerably clear from the Judge's analysis and conclusions in paragraphs [88]-[94]. In short, Mr W was informed by A2 that he was in a relationship with A1, and their observed behaviour and/or what they said - both before and after this disclosure - was (in his perception) consistent with the disclosure of being true. However, neither A1 nor A2 openly declared their relationship, and Mr W's understanding of the nature of their relationship was not necessarily correct. As the Judge indicated, Mr W's corroborative evidence had to be weighed in the balance with the remainder of the evidence.
26. Mr B's evidence is a different category, as he said in cross-examination that he had seen the appellants holding hands and kissing outside his restaurant. Thus, his evidence stands as a stark contrast to that of Mr W, who never claimed to have witnessed any overt homosexual behaviour between the appellants. If the Judge had found Mr B credible on this aspect of his evidence, it could reasonably be contended that his ultimate conclusion was perverse. However, the Judge did not find Mr B credible on this aspect of his evidence. He found it to be an embellishment which was "*potentially damaging to his credibility*".
27. At paragraph [99], the Judge identified another specific aspect of Mr B's evidence which he found to be damaging to his credibility and that of A1.
28. Ms Easty submits that the Judge erred in failing to make a clear finding as to whether in consequence he rejected the evidence of Mr B. I do not consider that it was necessary that he should do so when engaging with his evidence, and arguably it would have been wrong for him to do so until he had considered the remainder of the evidence. The Judge indicated that Mr B's reliability as a witness of truth was compromised by the adverse credibility findings in paragraphs [98] and [99], and it is apparent that the Judge ultimately rejected Mr B's corroborative evidence as he found that the appellants were not a genuine gay couple.
29. It is pleaded that the Judge misdirected himself in law in drawing an adverse inference from the absence of sexually explicit photographs. I consider that this is an unfair and inaccurate characterisation of the Judge's finding on the photographs at paragraph [72]. It is not the case that the Judge drew an adverse inference from the absence of sexually explicit photographs. He merely observed that the undated photographs did not, of themselves, establish that the relationship between the appellants was of the nature claimed by them. They did not show them together involved in "*any kind of intimate act*". This could include kissing or cuddling. It is thus unreasonable to assume that the Judge was calling for photographic evidence of sexually explicit acts. Also, the Judge did not

draw an adverse inference. He merely held that the photographs did not materially advance the appellants' case. Due to their contents and the appellants' admission that they had been taken for the purposes of the appeal, the Judge said: "*I consequentially have given them no material weight*".

30. It was open to the Judge to find that the photographs did not materially advance the appellants' core claim. In so finding, he was not by implication drawing an adverse inference from the non-production of sexually explicit photographs.
31. Ms Easty also made passing reference to paragraphs 11 and 12 of the grounds of appeal, in respect of which permission to appeal was not specifically granted by Judge Kelly. These paragraphs relate to passages in paragraphs 104 and 106 of the decision in which the Judge is alleged to have made a mistake of fact as to the evidence given by A1 and A2.
32. On 2 October 2017, the appellants' solicitors served a witness statement from Counsel, exhibiting his records "*during cross-examination*", and sought permission for the admission of this evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
33. Service of this evidence addresses the evidential deficiency identified by Judge Kelly when refusing permission to appeal on the grounds set out in paragraphs 11 and 12. However, a review of the decision reveals a more significant procedural hurdle, which is that the alleged mistakes of fact as to the oral evidence were raised as inconsistencies by Mr Bassi in his closing submissions, and thus Mr Sellwood had the opportunity to contest the factual basis of the asserted inconsistencies in his reply. However, he did not do so. He engaged with Mr Bassi's submissions on the premise that the oral evidence of A1 and A2 had not been misrepresented by Mr Bassi.
34. At paragraph [104], the Judge referred to Mr Bassi's submission that there was an inconsistency between A1 and A2 on the topic of whether they had made any enquiries about the possibility of obtaining accommodation to enable them to live together. A1 indicated that they had made such enquiries. A2 indicated that no such enquiries had been made by them. The Judge continued: "*Mr Sellwood sought to explain this discrepancy, by indicating that the first appellant might have made such enquiries, whilst not informing the second appellant that he had done so. I do not find such explanation adequately explains the fact that the second appellant was unaware that the first appellant's evidence was that 'they' had made enquiries about accommodation.*"
35. At paragraph 11 of the grounds, Mr Sellwood pleads that the purported inconsistency in the evidence between A1 and A2 does not exist, as his contemporaneous note from the hearing records A1 being asked whether he or A2 had made enquiries. However, it was not apparently submitted by Mr Sellwood at the time that Mr Bassi had misrepresented the evidence which had been given. It is also not suggested that the Judge has misrepresented Mr Sellwood's response to the apparent inconsistency

identified by Mr Bassi. Further, having considered the extract from Counsel's note which is reproduced at paragraph 11, I consider that it was open to the Judge to construe the series of answers given by A1 as importing that "they" (both A1 and A2) had made enquiries about accommodation.

36. At paragraph [106], the Judge addressed Mr Bassi's submission that A1 and A2 had been inconsistent about what they intended to do if their appeals were unsuccessful. A1 had said that they had not discussed this, whereas A2 said that he and A1 had discussed it. The Judge said that Mr Sellwood had sought to address this discrepancy in his submissions, but he was satisfied that there was a discrepancy between the two of them in this regard.
37. Paragraph 12 of the grounds does not identify any mistake of fact. The line taken by Mr Sellwood is that the oral evidence given by A2 is consistent with what A1 said in his witness statement at paragraph 21. But even if this right, this does not change the fact that A1 and A2 gave contradictory oral evidence on the topic. Therefore, it was clearly open to the Judge to draw an adverse credibility inference from this discrepancy.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

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

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 8 October 2017

Judge Monson

Deputy Upper Tribunal Judge

