Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10982/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April 2018	**On 03 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Q A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel instructed by Milestone Solicitors
For the Respondent: Mr S Kotas, Senior Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 26 February 1987. He made an application for asylum on 18 April 2017 on the basis of his sexual orientation. This application was refused in a decision dated 15 October 2017. The Appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal Bartlett at the hearing on 27 November 2017. In a decision and reasons dated 6 December 2017 the judge dismissed the appeal essentially on the basis that she did not accept that the Appellant is a gay man.

2. Permission to appeal to the Upper Tribunal was sought on the basis that the judge had erred materially in law in the manner in which she assessed the Appellant's evidence of his relationship with his former school friend, A; in respect of the definition of the relationship of *"relationship"* and that the judge had erred in finding that the Appellant was evasive. It was submitted that the judge erred in that there are a number of findings that were based on purely subjective speculation i.e. at [23] in finding that it was not credible that the Appellant would not have been attracted to anyone other than A as a teenager, nor that he did not discuss with his housemates what he wanted A to know about his sexual orientation and that this was an error not least in light of the fact that by the time A visited the UK the Appellant was openly living as a gay man.

3. Thirdly, it was submitted that the judge erred in her assessments of photographs submitted by the Appellant at [25] which she found *"gives little support to his claim he is homosexual."* This failed to take into account the fact that the photographs depict the Appellant in close physical contact with A and in one photograph they are kissing. Fourthly, at [26] the judge erred in finding that the Appellant's attendance at LGBT groups *"does little to support his claim"* when it is obvious that attendance at such groups do support a claim based on sexual orientation.

4. Fifthly, the judge erred at [26] in her assessment of the evidence of Mr H. who attended the hearing before the First tier Tribunal and gave oral evidence that he believed the Appellant to be a gay man and the judge dismissed this evidence erroneously on the basis that Mr H. believed the Appellant to be gay due to mere attendance at groups which was not the extent of his evidence.

5. Sixthly, the judge at [26] inappropriately stated *"as a judge sitting in this Tribunal I am aware of the length people will go to to support their claim"* which was not only inappropriate but implicitly suggested that Mr H.'s evidence was a fabrication, absent any evidential foundation for this.

6. Seventhly, at [27] in considering the letters from MindOut when, rather than consider that evidence in the round, the judge took a point against the Appellant on the basis it was not credible given he had been attending MindOut since 2014 that he did not know he could claim asylum based on his sexual orientation until January 2017. The evidence from MindOut was clear and supported the Appellant's claim to be a gay man.

7. Eighthly, the judge erred in failing at [29] when assessing the issue of messages on the Appellant's phone to distinguish between messages of a practical nature and those of a romantic nature and it was perfectly reasonable for the Appellant not to use his phone for intimate messages but rather just for practical purposes.

8. Permission to appeal was granted by Upper Tribunal Judge Storey in a decision dated 19 February 2018 on the following basis:

> *"It is arguable that the judge's assessment of whether or not the Appellant had shown he was gay relied unduly on subjective*

assumptions and was unduly dismissive of photographic evidence relating to close physical contact with A. and attendance at LGBT events. Despite noting at paragraph 21 that sexuality is primarily about identity, it is unclear whether at various points later on the judge treated it as essentially about physical/sexual contact".

9. A Rule 24 response was lodged by the Respondent on 7 March 2018 on the basis that the Respondent opposed the appeal and the grounds of appeal amounted simply to a disagreement with the judge's findings and an attempt to reargue the case portraying the evidence from a different perspective. It was submitted the judge identified numerous points on which she found the Appellant to lack credibility or to be inconsistent which combined led her to the reasonable conclusion that the Appellant had not discharged the burden of proof. The judge was entitled to decide as she did and provided a clear explanation for each of her findings. The evidence including the photographs and that of the witness was not sufficient such as to compel the judge to find in the Appellant's favour."

Hearing

10. At the hearing before me, I heard detailed submissions by Mr Briddock on behalf of the Appellant, who took me through the judge's conclusions and also the evidence in support of the Appellant's claim, including the photographs and the two letters dated 4 August 2017 and 16 November 2017 at AB86 and 87 from the LGBT mental health charity, MindOut confirming that the Appellant had been attending their organisation. Mr Briddock submitted the judge had made a number of erroneous findings in respect of the evidence of Mr H., at [26] where she held: *"Mr Hart's complete failure to root the Appellant's homosexuality in anything more than mere attendance at groups does little to support the Appellant's claim"* Mr Briddock submits that this was erroneous in that Mr H.'s evidence was much wider than simply confirming the Appellant's attendance at groups and that he also refers to the fact that they have socialised together. Mr Briddock produced a copy of his Record of Proceedings which have been extracted and appended to the grounds of appeal in relation to the confusion over the definition of "relationship" by the Appellant who sought to distinguish between a sexual relationship of a short duration e.g. with somebody known as C. and a longer term romantic and sexual relationship e.g. with A.

11. In respect of the photographs Mr Briddock accepted that whilst photographs do not prove sexual orientation they do support the Appellant's claim to be a gay man and the judge had erred at [25] in failing to consider the photographs in the round with the other evidence.

12. In his submissions Mr Kotas submitted that he properly understood the grounds were simply a disagreement with an adequately reasoned decision and that in essence, the complaint was more of a quibble over interpretation of the evidence rather than identification of any material errors of law. However, he accepted at [22] that there was an element of subjectivity on the judge's part in relation to her assessment and her

finding of implausibility in respect of the Appellant's lack of attraction to anyone else. He accepted that the photographs appeared organic or natural and that at [26] the judge's expression as to her awareness of the lengths people go to has no place in the determination, albeit he did not consider that this was fatal.

13. In reply, Mr Briddock accepted that taken individually the separate pieces of evidence were not conclusive but when considered as a whole it was clear that the low standard of proof in respect of the Appellant establishing his sexual orientation had been reached and the judge had erred in concluding to the contrary.

Findings and Decision

14. I find material errors of law in the decision of First-tier Tribunal Judge Bartlett essentially for the reasons set out in the grounds of appeal. I have considered these errors in a cumulative sense, in that as Mr Briddock acknowledged each individual piece of evidence may not be sufficient, but when taken as a whole the evidence appeared to indicate that the Appellant was, as he asserted, a gay man. The judge however, appears to have treated each piece of evidence separately and has made errors in the assessment of some of that evidence. In addition to the oral evidence of the Appellant, three further witnesses were called in support of his claim, each of whom produced a witness statement and was subjected to cross-examination on behalf of the Home Office. In addition to the live oral evidence there were letters from a Mr Phil Brook, an LGBTQ Mental Health Advocate at MindOut and photographs of the Appellant with friends including with A.

15. It is clear from the Appellant's evidence that he distinguished between what in his mind was a relationship e.g. with his former partner A. and what he also described as *"one night stands with random men."* He also stated that he went on dates but did not use gay apps and he would attend gay clubs. It is unclear why the judge reached the conclusion she did in light of the totality of the evidence before her. The judge records at [8] that the Appellant had dated other men and had had a sexually intimate relationship with somebody called C. Yet this evidence is not properly or clearly addressed by the judge in finding that the Appellant could not discharge the burden of proof in respect of his sexual orientation. The judge held at [22] as follows.

> *"22. I found the Appellant's answers in the asylum interview on the subject (of A) to be evasive. At the oral hearing whenever he was asked about relationships he wished to focus entirely on A; it was only after a considerable number of questions that he identified having any form of relationship beyond a friendship with anybody else. Whilst on the one hand such a focus on one individual could be viewed as slightly obsessive and focussed behaviour I find that he was evasive. Further the lack of ability of the Appellant to identify an attraction to anybody except one*

individual and until he came to the United Kingdom in 2009 when he was 20 years old not to be credible."

16. The difficulty with this is even if the Appellant was evasive, it does not mean that his evidence e.g. that he had had an intimate relationship with someone other than A is not true and that is not clearly or properly addressed by the judge.

17. In relation to the fact that the Appellant did not tell A. he was gay prior to A.'s visit to the UK, the judge rejected this evidence at [23] on the following basis:

"I do not accept that the Appellant would not have given extremely careful thought as to what was communicated about his sexuality and how it was communicated to A. prior to A. coming to the United Kingdom and that he was not to discuss this carefully with his friends and housemates. On the Appellant's own account A. was extremely important to his life as was his sexuality. It is not credible that he would have left the communication about it as a matter of chance particularly when he claims to have been living an openly gay lifestyle."

18. I find that the judge erred in this respect in that the Appellant had in 2009 when he came to the United Kingdom accepted his sexual orientation and had since that time been living an openly gay lifestyle. In that circumstance and given that he had been in love with A. since prior to that time and prior to coming to the United Kingdom it seemed once A. decided to visit him in the United Kingdom it was inevitable that he would disclose his sexual orientation and his feelings for A. to him. I do not find that in itself is inherently implausible or lacks credibility.

19. The judge's analysis of the evidence of Mr H. is at [26]: "*however Mr Hart's complete failure to root the Appellant's homosexuality in anything more than mere attendance at groups does little to support the Appellant's claim."* The difficulty with that finding is that there are photographs of the Appellant with Mr H. who gave evidence that they are friends in that they socialise together and they have also attended support groups. The evidence of Mr H. is in the Appellant's bundle at pages 19 to 20 where he describes himself as a retired businessman and a gay man. He stated he met the Appellant in Compton's, a gay bar in Soho and that he is a volunteer with Opening Doors London, which is a large gay charity offering counselling and social support and he meets the Appellant regularly as a friend. They visit gay bars together, go to gay organisations like London Friend and ELOP and they also attended Brighton Pride together on 5 August 2017. He makes reference to the Appellant having an honest and sincere character. I find that the judge's assessment of his evidence that it completely failed to root the Appellant's sexual orientation in anything more than mere attendance at groups does not do justice to his evidence, considered as a whole.

20. I find that the judge further erred at [29] in finding: *"I consider that there is a great difference between a perfectly understandable desire not to use*

dating apps and a purported total denial of using basic messaging to arrange meetings and the aftermath of such if they were romantic in nature". This finding is not in accordance with the oral evidence that was before the judge, which was that the Appellant used messaging to arrange dates but not to communicate intimate thoughts or feelings. It is also clear from the Record of Proceedings that the Appellant stated that he was concerned about dating apps because he felt there were "*dodgy false profiles and sometimes people say nice over the internet but when meet they are very different and that he liked meeting people on a one to one basis and not over the gay apps*".

Decision

21. For the reasons set out above I find material errors of law in the decision of First-tier Tribunal Judge Bartlett. I set that decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First-tier Tribunal.

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 Rebecca Chapman Date 29 April 2018

Deputy Upper Tribunal Judge Chapman