



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

Appeal Number: PA/11231/2018

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 29th May 2019**

Decision & Reasons Promulgated

On 13th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**LWC
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Kotak of Counsel, instructed by Milestone Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Sangha (the judge) of the First-tier Tribunal (the FtT) promulgated on 10th January 2019.
2. The Appellant is a Malaysian citizen born 5th December 1967 who on 13th February 2018 applied for international protection on the basis of her sexuality. She claims to be a lesbian.

3. The application was refused on 6th September 2018, the Respondent not accepting the Appellant's claim to be a lesbian. The appeal was heard on 23rd November 2018.
4. The judge heard evidence from the Appellant and two witnesses, Eddy Chin, and Hussain Ashfaq. The judge did not accept the Appellant's claim to be a lesbian. The appeal was dismissed on all grounds. The judge found at paragraph 36;

"36. I had the benefit of hearing oral evidence from the Appellant and two witnesses on her behalf. I did not find the Appellant to be a credible and plausible witness and I also found the other witnesses to be lacking in credibility, reliability and plausibility."

The Application for Permission to Appeal

5. Five grounds were relied upon, contending that the judge had materially erred in law.
 1. The judge's assessment of the Appellant's credibility was wrongly predicated on stereotypical assumptions and/or he failed to have regard for material guidance on the assessment of credibility in asylum claims. That guidance was said to be the UNHCR guidelines on claims to refugee status based on sexual orientation and gender identity, the Home Office Asylum Policy Instruction on sexual orientation in asylum claims, and the Judicial Equal Treatment Bench Book.
 2. The judge had failed to give proper reasons as to why the Appellant's relationship with her husband and family are said to undermine her claim to be a lesbian.
 3. The judge failed to have regard to material evidence of the Appellant's witnesses, two of whom attended the oral hearing and gave evidence confirming their belief that the Appellant is a lesbian.
 4. The judge erred in his approach and reliance on the Appellant's immigration history and section 8 of the Asylum (Treatment of Claimants, etc.) Act 2004.
 5. The judge erred by failing to consider the Appellant's evidence in the round.

The Grant of Permission to Appeal

6. Permission to appeal was granted by Judge Keane of the FtT in the following terms;

"For the reasons mentioned in the detailed grounds the grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. In particular the judge arguably took into account irrelevant considerations at the outset of the judge's assessment of the appellant's credibility at paragraph 38 of the decision in according weight to the absence of evidence that the appellant entered into a lesbian relationship in Malaysia and to the

appellant's omission publicly or outwardly to display lesbian tendencies. The judge arguably took into account stereotypical assumptions as to how a lesbian should manifest her sexual orientation. The application for permission is granted."

7. Following the grant of permission, the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in which it was contended that the judge had not materially erred in law and had directed himself appropriately.
8. Directions were given that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it must be set aside.

My Analysis and Conclusions

9. At the oral hearing Ms Kotak relied and expanded upon the grounds upon which permission to appeal had been granted. Mr Howells relied upon the rule 24 response. It was accepted that the judge had erred in law as contended in ground 3, by failing to give adequate reasons for rejecting the evidence of Mr Ashfaq. It was however argued that this error was not material as the judge had given other, sustainable reasons for not accepting the credibility of the Appellant's claim to be a lesbian.
10. In considering whether the judge provided adequate reasons for findings I follow the guidance in Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) and set out below the headnote to that decision;

"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."
11. The judge considered the evidence in relation to the Appellant's claim to be a lesbian, and made findings, at paragraphs 38-50.
12. It was rightly conceded that the judge had erred by failing to give adequate reasons for rejecting the evidence of Mr Ashfaq. In my view this is a material error of law for the following reasons.
13. The judge at paragraph 36 described both witnesses to be lacking in credibility, reliability and plausibility. It is essential to provide adequate reasons for reaching such a finding.
14. At paragraph 49 the judge noted that Mr Ashfaq had submitted a witness statement, but noted that no letter or witness statement had been provided by Mr Ashfaq prior to the hearing. The judge recorded "It leads me to wonder why he would take out the time, trouble and effort to give a statement in support of the Appellant in these circumstances". The

answer to that question may be that Mr Ashfaq had been asked to attend the Tribunal hearing to confirm his belief that the Appellant is a lesbian.

15. The judge found Mr Ashfaq's statement to be self-serving, bearing the hallmarks of being written to order.
16. I do not find that adequate reasons have been given for this conclusion, nor have adequate reasons been given for finding Mr Ashfaq to be lacking in credibility, reliability and plausibility.
17. The evidence given by Mr Ashfaq was that he is a British citizen, who had known the Appellant for over four years. She had been a regular customer at his restaurant. Mr Ashfaq confirmed his belief that the Appellant is a lesbian. He stated in his witness statement, and evidence at the hearing, that he had met both of her previous same-sex partners. He described the first of those partners as being a regular customer at his restaurant. He also described being told by the Appellant and her first partner, that they were in a same-sex relationship. Mr Ashfaq also described meeting the Appellant's second same-sex partner, who came to his restaurant and to whom he was introduced.
18. The weight to be attached to witness evidence is for the judge to decide. However if a judge decides not to accept what appears to be material evidence, then in accordance with the guidance in Budhathoki the judge must give reasons so that the losing party can understand why the evidence has been rejected.
19. It is not clear from reading the judge's decision why Mr Ashfaq's evidence was roundly rejected. It does not appear that Mr Ashfaq was asked why he had not made a witness statement prior to the date of the hearing. If this was to be held against him he should have been asked to explain the circumstances.
20. The judge also rejected the evidence of Mr Chin who provided a witness statement and gave oral evidence. Mr Chin's evidence may be regarded as not being as material as that of Mr Ashfaq, in that Mr Chin in his witness statement does not state that he met the two same-sex partners of the Appellant, but was told about them by the Appellant, and was told by the Appellant that she is a lesbian. The evidence may nevertheless be material, in that Mr Chin stated that he learned of the Appellant being in a same-sex relationship three or four years prior to making his witness statement in November 2018.
21. The judge notes that Mr Chin had previously submitted a letter in support of the Appellant, and this letter can be found at F1 of the Respondent's bundle and is dated 22nd August. Presumably that will be 22nd August 2018. This letter supports the Appellant in her application for asylum and refers to the Appellant helping Mr Chin's wife who was terminally ill. The judge rejects Mr Chin's evidence that the Appellant is a lesbian because this was not mentioned in his letter of support. There is no indication that

Mr Chin was asked why he had not mentioned in his letter of support that the Appellant is a lesbian. If this was to be held against him and an adverse credibility finding made, Mr Chin should have been given the opportunity to provide an explanation. In my view this also amounts to a material error of law.

22. The grounds upon which permission to appeal has been granted are lengthy, but I do not find it necessary to consider each of those grounds. This is because, in my view, the material error of law in relation to the rejection of the evidence given by two witnesses at the hearing, infects the other credibility findings made by the judge. I therefore conclude that the credibility findings are unsafe and I am afraid, must be set aside. It is clear to me that this decision has been prepared with care but must be set aside as being unsafe in the circumstances.
23. The decision must be remade. There are no findings of fact preserved. At the hearing, both representatives were in agreement, that if there was an error of law, the appeal should be remitted back to the FtT to be heard afresh. Having considered the Senior President's Practice Statements at paragraph 7.2, I find that the appropriate course is a remittal back to the FtT to be heard afresh. This is because, it is more appropriate for the substantial judicial fact-findings required, to be carried out by the FtT rather than the Upper Tribunal.
24. The appeal will therefore be heard again by the FtT and the parties will be advised of the venue, time and date in due course. The appeal is to be heard by an FtT Judge other than Judge Sangha. The Appellant's solicitors are put on notice that the Appellant's bundle that was before the FtT is not on the Tribunal file. The bundle is missing pages 14-119.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

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 her or any member of her 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 7th June 2019

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

I make no fee award. The issue of any fee award will need to be considered by the FtT.

Signed

Date 7th June 2019

Deputy Upper Tribunal Judge M A Hall