



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

Appeal Number: PA/11546/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 14th August 2019**

**Decision & Reasons Promulgated
On 30th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

**MR S.H.
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Popal, Counsel

For the Respondent: Mr Avery, Senior Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that direction.

DECISION AND REASONS

1. This is an appeal by Mr S.H. against a decision of Judge Freer promulgated on 20th March 2019, to dismiss his appeal against the refusal of his protection claim.

2. The Appellant is a citizen of Bangladesh. He claims he is a homosexual and accordingly at risk of persecution on return to Bangladesh by both state and non-state actors.
3. However the judge did not believe that the Appellant was gay. He noted that the Appellant was supported at the hearing by two witnesses; the first Mr Kawsar is the chairperson of Apanjon, a gay community organisation. The second witness who came on the Appellant's behalf is his partner R.A. and is someone with whom the Appellant has been in a discreet gay relationship for three years.
4. After hearing evidence from the Appellant and his two witnesses, the judge said the following at [80]:

“The Appellant’s fear of persecution is accepted if he proves that he is a gay man. Do I believe he is a gay man? I have seen his demeanour and that of his partner and the man from the gay community organisation namely Mr Maskur Hussain Kawsar, the Chairperson of Apanjon. I have no doubt that the latter gentleman is a gay man. It is not just that he wore lipstick and had an effeminate way of looking round the room and speaking but also, and much more significantly, he is a committed organiser in his gay organisation which is not likely to be a post for non-gay men, as it would not interest them, and he has no asylum claim to make.”
5. Further at [82] the judge followed this line of analysis up (when commenting on what the judge considered discrepant evidence) saying:

“The evidence suggests strongly to me that either Mr Kawsar has a terrible memory or was not candid or both. He is the only witness who was obviously a gay man. It is possible that he has been produced to the Tribunal by a straight man with an asylum problem, namely both the Appellant and his claimed partner, if they are both straight men....”
6. At [90] the judge said the following:

“Mr Kawsar has not explained how he decides if a man is gay or not. I was supposed to find that somebody who is an expert on gay Bangladeshi men has identified the Appellant with a partner and not only that but he has also taken the trouble to come along to a Court hearing. It is possible that Mr Kawsar was working from a template document when he created the witness statement signed on 20th February 2019 but he was not articulate about his writing process and frankly not everybody can be.”
7. At [108] the judge says the following:

“The man he claims to be his partner is not proven to be a gay man or his partner, perhaps just a friend cooperating as they are both making asylum claims.”
8. Following that analysis the judge dismissed the appeal finding that the Appellant was not a gay man.

Onward Appeal

9. The Grounds of Appeal against the decision may be summarised as follows. The judge has made findings on the Appellant's sexuality by assessing the Appellant's demeanour to determine whether he is gay. It is asserted that this is not an appropriate way in which to make such a finding because assessing demeanour implies the imparting of a subjective viewpoint. The judge has used his assessment of demeanour as the platform for assessing credibility. That is the wrong test. Credibility should be assessed by the consideration of the consistency and plausibility of evidence both written and live.
10. The grounds make a further point that the judge failed to apply the standard of proof applicable to protection appeals which is the lower standard of proof applying anxious scrutiny, because at [103] the judge indicates in his overall conclusion that, "On balance, he is not gay and not regarded as gay."
11. Permission to appeal the decision was granted on a renewed application to the Upper Tribunal in the following terms:

"It is arguable that the Judge based his assessment of the appellant's claimed homosexuality by reference to irrelevant matters, such as the demeanour of the appellant and his witnesses, coupled with the Judge's subjective expectation of how gay men should present (Ground 3). Arguably, this was a material error of law that tainted the Judge's overall credibility assessment."
12. Thus the matter comes before me to decide whether the decision of the FtJ contains such error of law that it must be set aside and remade.

Error of Law

13. I heard submissions from both representatives. Miss Popal's submissions relied on the grounds seeking permission. Mr Avery's submissions in essence amounted to saying that the judge had given adequate reasons for finding that the Appellant's claim was not a credible one. At the end of submissions I announced my decision that I was satisfied that despite the best endeavours of Mr Avery to persuade me to the contrary, the grounds in my judgment are made out. I am satisfied that on a reading of the decision the judge has based his credibility findings on a subjective view of how he considers gay men should look and present. Following on, I am satisfied that the judge's subjective expectation of how gay men should present amounts to a material error, in that it clearly taints the judge's overall credibility assessment when determining whether the Appellant is gay. I find therefore that the decision must be set aside in its entirety in order that a fresh assessment of the credibility or otherwise of the Appellant's claim is undertaken.
14. The representatives were in agreement that having regard to the reasons outlined above in setting aside the FtT's decision, the only appropriate

course is to remit the appeal to be heard afresh at Taylor House before a judge other than Judge Freer. I agree with this course. Any further directions concerning the relisting of this appeal must be a matter for the Resident Judge at Taylor House.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal is set aside. The matter is remitted to the First-tier Tribunal for a fresh hearing.

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
August 2019

C E Roberts

Date 21

Deputy Upper Tribunal Judge Roberts