Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07732/2019 (V)

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On : 22 February 2021	**On : 5 March 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

BH
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza of JKR Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

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2. The appellant is a citizen of Bangladesh, born on 23 November 1978. He has been given permission to appeal against the decision of First-tier Tribunal Judge McIntosh dismissing his appeal against the respondent's decision to refuse his asylum and human rights claim.

3. The appellant claimed to have arrived in the United Kingdom on 1 January 2005, entering illegally with an agent, and subsequently travelled to France where he claimed asylum but left before receiving the outcome and returned to the UK after a month. On 1 March 2008 he made an application for leave to remain outside the immigration rules on compassionate grounds on the basis of being Bihari and stateless. His application was refused on 30 November 2009 with a right of appeal, but he withdrew his appeal after lodging it, on 18 May 2010. On 7 January 2012 the appellant made an Article 8 human rights claim which was refused with a right of appeal on 7 August 2013. His appeal against that decision was dismissed in the First-tier Tribunal on 9 October 2013 and he became appeal rights exhausted on 23 October 2013. After being encountered during an enforcement visit to an Indian restaurant, the appellant made further submissions on 23 September 2015 which were rejected under paragraph 353 of the immigration rules on 15 April 2016, followed by a further human rights claim, which was also rejected under paragraph 353 on 4 April 2017.

4. After being encountered once again during an immigration enforcement visit in an Indian restaurant and served with removal papers, on 24 April 2019, the appellant claimed asylum on the basis of his sexuality and submitted a psychological report in support of his claim. His claim was refused on 26 July 2019. It is his appeal against that decision which has given rise to these proceedings.

5. The appellant claimed to fear persecution on return to Bangladesh because he was gay. He claimed to have realised he was gay when he was about 16 or 17 and to have had his first gay relationship in Bangladesh when he was 17. He claimed to have had a relationship, in secret, with MK from 1997/98 until MK left Bangladesh in 2000 and to have been living openly as a gay man since arriving in the UK. He was in a relationship with MM from May/ June 2014 until February 2016 and then with JA from June 2017. The appellant claimed in his supplementary interview that he had told his friend about his asylum claim after his previous interview in June 2019 and his friend had told other people as well his brother in Bangladesh, as a result of which his brother had threatened to cut him if he returned there. He therefore feared his own family, as well as the government and religious extremist groups in Bangladesh.

6. The respondent did not accept that the appellant was gay, noting that his account was vague, that there were inconsistencies in his evidence and that he had made no mention of his sexuality when claiming asylum in France or when previously applying for leave to remain in the UK. The respondent considered that the appellant would be at no risk on return to Bangladesh and that his removal would not breach his human rights.

7. The appellant's appeal was heard by First-tier Tribunal Judge McIntosh on 31 January 2020, following an initial start on 3 January 2020 which was discontinued due to difficulties understanding the interpreter. For the appeal, the appellant submitted photographs of himself with his partner and various supporting letters, including confirmation of his membership of a British Bangladeshi LGBT organisation known as APONGHOR and his attendance at gay clubs and a letter purporting to be from his previous partner JA. The judge heard from appellant and four other witnesses, S, MS, J and K. It was recorded by the judge that the appellant claimed to no longer be in a relationship with JA. The judge noted that the appellant's claim in France had been on the basis of his political beliefs and his application for leave to remain in the UK had been on the basis of his Bihari ethnicity. The judge gave no weight to the evidence of the witnesses whom he found to be credible but to have been manipulated by the appellant and rejected the appellant's claim to be gay. He found that the appellant would be at no risk on return to Bangladesh and he dismissed the appeal.

8. Permission was sought by the appellant to appeal to the Upper Tribunal on three grounds: that the judge had failed to give reasons for rejecting the witnesses' evidence; that the judge had failed to consider the evidence of S; and that the judge had raised the standard of proof too high. Permission was refused by the First-tier Tribunal but was subsequently granted by Upper Tribunal Judge Norton-Taylor on a renewed application, as follows:

1. "The appellant is said by the respondent to be a citizen of Bangladesh, although he himself asserts that he is stateless. The First-tier Tribunal clearly regarded him as being Bangladeshi. There is no challenge to this in the grounds of appeal.

2. The appellant seeks permission to appeal against the decision of First-tier Tribunal Judge McIntosh, promulgated on 24 February 2020, by which she dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims. The core of the protection claim was the assertion that the appellant was gay and would face persecution and/or treatment contrary to Article 3 ECHR on return to Bangladesh. The judge did not accept that he was in fact gay.

3. Ground 1 asserts that the judge failed to give adequate reasons for rejecting the evidence of supporting witnesses. In fact, the judge expressly stated that she found the witnesses to be credible (see [52]). She found that the appellant had "manipulated" them into providing support for his case and that they had no "objective means" of verifying what he had told them. In light of the evidence that the relevant witnesses had provided (according to what is stated earlier on in the judge's decision), it is arguable that there is a lack of adequate reasoning as to why their credible testimony was deemed to be of no probative value to the assessment of whether the appellant was in fact gay. It is unclear what the judge meant by the phrase "objective means", and it is arguable that this was not a sufficient basis to discount the entirety of the witnesses' evidence.

4. Ground 2 refers to the evidence of "Ms" Saifullah and the judge's failure to consider it. In fact, the witness in question was "Md" Saifullah. It is arguable

that the judge failed to take his evidence from a previous hearing into account, or that she failed to give reasons for not doing so.

5. Ground 3 contends that the judge applied too high a standard of proof by stating at [60] that two of the witnesses could not say with "certainty" what the appellant's sexuality was. Whilst I am always very cautious about assertions on the standard of proof, particularly bearing in mind that judge's decisions must be read in the round, in the present case it is arguable that the judge applied an impermissible threshold to potentially material evidence.

6. In granting permission, the appellant will no doubt be aware that the judge made a number of other adverse credibility findings against him which have not specifically been challenged in the grounds of appeal. When the Upper Tribunal comes to consider whether the judge made errors of law, the appellant will need to satisfy it not only that such errors are made out, but that they are material to the extent that the decision should be set aside.

7. I am of the provisional view that the questions of whether the First-tier Tribunal erred in law and, if it did, whether it's decision should be set aside, can fairly be dealt with by way of a remote hearing."

9. The matter then came before me for a hearing, by way of skype for business. Both parties made submissions before me, Mr Reza relying on and expanding upon the grounds of appeal, and Ms Everett submitting that the judge was entitled to conclude that the appellant had manipulated the witnesses and therefore to accord their evidence the weight that she did.

10. For the reasons given by Upper Tribunal Judge Norton-Taylor at [3] of his decision granting permission, I cannot agree with Ms Everett that the grounds amount to a simple disagreement with the weight the judge gave to the evidence of the witnesses. It seems to me that, absent further explanation, the judge's finding, at [52], that the witnesses were all credible, is incompatible with his finding that their evidence was of no probative value to the assessment of whether the appellant was gay.

11. By referring, at [52], to the witnesses having no objective means of verifying the information the appellant had disclosed to them about his sexuality, the implication in the judge's reasoning was that the witnesses had no knowledge of the appellant's sexuality other than the information he gave to them. Whilst that could well be the case with the evidence of S, it is of note that the evidence of MS, J and K was that they each had direct knowledge of the appellant's sexuality, either by being sexually intimate with him or by seeing him being sexually intimate with other men. The same applies to the evidence of JA who claimed to have been in a relationship with the appellant, although he did not give oral evidence before the judge. The judge made no findings on the evidence of JA. In addition, she made no specific findings on the claims of the other witnesses to have had, or to have had direct knowledge of, intimate contact with the appellant. In the circumstances it is not clear in what way, and to what extent, the judge accepted their evidence and believed that they had been manipulated by the appellant.

12. Upper Tribunal Judge Norton-Taylor, at [6] of his grant of permission, suggested that that was not necessarily a material error on the part of the judge requiring the decision to be set aside, given the other, unchallenged adverse credibility findings based upon inconsistencies and discrepancies in the evidence. However, I cannot see how such errors in her decision could not be considered sufficiently material for her decision to be set aside. Her positive credibility findings simply cannot be reconciled with her adverse findings and it seems to me that the case has to be heard afresh by another judge, in order for a full assessment of the witnesses' evidence to be undertaken and clear findings to be made.

13. I therefore set aside Judge McIntosh's decision in its entirety, with no findings preserved and remit the case to the First-tier Tribunal to be heard *de novo* before a different judge.

DECISION

14. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard afresh before any judge aside from Judge McIntosh.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 22 February 2021