



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/08015/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 10<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 12<sup>th</sup> July 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

S C  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Dolan, of Counsel, instructed by Duncan Lewis & Co Solicitors  
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

*Introduction*

1. The appellant is a citizen of Bangladesh. He came to the UK when he was 13 years old in 2001, and overstayed. He made a human rights application in December 2009, but this was refused without a right of appeal. He made another Article 8 ECHR claim in July 2013, but this was refused without a right of appeal in August 2013. A further similar application was made in December 2014, which was again refused without a right of appeal in January 2016. In January 2015 the appellant was arrested for facilitating a breach of immigration laws, and pleaded guilty to this offence in December 2015. The appellant was detained for removal on 10<sup>th</sup> January 2017. He claimed asylum on 10<sup>th</sup> February 2017 on the basis of his sexuality

and a fear of persecution on return to Bangladesh. This asylum claim was refused on 10<sup>th</sup> August 2017. His appeal against the refusal of asylum decision was dismissed on all grounds by First-tier Tribunal Judge Dean in a determination promulgated on the 11<sup>th</sup> April 2018.

2. Permission to appeal was granted by First-tier Tribunal Judge L Murray on 2<sup>nd</sup> May 2018 on the basis that it was arguable that the First-tier judge had erred in law in making mistakes of fact which materially affecting the outcome of the decision, and in particular the credibility of the claim. Permission was granted to argue all of the grounds.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

### *Submissions – Error of Law*

4. It is argued firstly that the First-tier Tribunal erred in a material finding of fact at paragraph 21 of the decision. There it is said that all of the evidence that the appellant was part of a London based support group for gay men was post his asylum claim, and therefore did not assist him. The evidence of DF was that he met the appellant at the support group in January 2017. As the appellant was detained on 10<sup>th</sup> January 2017 until after he made his asylum claim that evidence must mean that DF met the appellant prior to the asylum claim being made. DF was not asked if he was mistaken or his evidence challenged in any way in the proceedings.
5. The appellant argues in his second ground of appeal that there were errors in the findings at paragraphs 16 to 18 of the decision related to the previous human rights applications that the appellant made in July 2013 and December 2014. The appellant's evidence was that he had not decided to live openly as a gay man until after he made these applications, and that the relationship with AU was one which was hidden from family and the community at that time. The appellant says that he did this because he did not want to be open with his family and community. As such the appellant had no asylum claim based on his sexuality to make at that point, as he was being discrete for reasons other than a fear of persecution, see HJ (Iran) v SSHD [2010] UKSC 31.
6. The third contention by the appellant is that the First-tier Tribunal failed at paragraph 17 of the decision to consider that s.8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 matters only potentially damage an appellant's credibility, applying JT (Cameroon) v SSHD [2008] EWCA Civ 878.
7. Mr Bramble accepted that there were material errors of law in the decision of the First-tier Tribunal and the decision should be set aside with no findings preserved. I accepted that this was the case, and set out my brief reasons below.
8. Both parties argued that it was appropriate to remit the matter to the First-tier Tribunal because the only issue in the appeal was credibility, as if the appellant was found to be an openly gay man it is accepted that he has a well founded fear of persecution on return to Bangladesh, and given that there would have to be

extensive fact finding on this issue as there would be five witness (four of whom had come to the Upper Tribunal today) who would give evidence on this issue.

9. I have taken into account paragraph 7.2 of the Senior President's Practice Statements, and agree with the submissions made by both representatives that it is appropriate to remit this appeal back to the First-tier Tribunal to be heard afresh. There are no findings preserved. The reason for remittal is that substantial fact-finding needs to be undertaken, and this is more appropriately undertaken by the First-tier Tribunal rather than the Upper Tribunal.

#### *Conclusions – Error of Law*

10. I only given brief reasons for the finding that the First-tier Tribunal erred in law given the agreement of the parties that this was the case and that the decision should be set aside in its entirety.
11. The evidence of DF in his letter is that he had met the appellant at a gay London support group in January 2017, that they had become friends and he found he was an honest person and supported his case to stay in the UK. He attached a copy of his passport to verify his identity and confirmed he was willing to attend court. DF did attend the hearing and give oral testimony, as set out at paragraph 5 of the decision. I find that it was a factual error made by the First-tier Tribunal at paragraph 21 to find that the evidence regarding the gay support group was not supportive of the appellant's claim because it only related to the period after he made his asylum claim. On this evidence DF must have met the appellant at the support group prior to his being detained and claiming asylum.
12. I also find that the First-tier Tribunal has erred by failing to take into account that whilst "certain behaviours" must be considered damaging to credibility ultimately they only potentially do so when considered with all of the evidence, as per the decision of the Court of Appeal in IT (Cameroon).
13. The evidence of the appellant relevant to whether he was discrete about his sexuality for reasons other than a fear of persecution up to the point when he made the human rights application in December 2014 is as follows. At paragraph 8 of his statement he says that he told only a few people but didn't want to "expose" himself and says before his 2017 asylum application he had kept his sexuality "secret", particularly from his "community". He says in his asylum interview in July 2017 he decided to be open with his family a couple of years ago at question 82, and that delay was because he was afraid of the reaction he would get. He also said that he was open with friends and family and not the community because of homophobia in answer to question 66. He also explains in interview that he avoided discussing his sexuality and kept it to himself prior to going to groups from the beginning of 2017, see responses to interview questions 78 and 79. AU, the man with whom the appellant had a discrete relationship, sets out in his letter that he was not interested in a serious relationship and that the relationship was a secret as he was and is married with children and wishes to remain that way. The evidence of RP is that although the appellant was going to gay events and talked to him about being gay in 2013/2014 the appellant did keep his sexuality "hidden" at that

point. This also seems to be the picture in the letter of AH who had a conversation with the appellant in 2013. I find that the conclusion of the First-tier Tribunal that the appellant could have raised an asylum claim based on his sexuality in his earlier human rights applications as he had a viable basis for asylum at that point is insufficiently reasoned in the light of the evidence before the First-tier Tribunal.

14. In relation to the remaking of this appeal I draw the attention of the parties and the First-tier Tribunal to the following which I believe to be relevant to the decision-making in this appeal. The respondent's guidance "Asylum Policy Instruction: Sexual Orientation in Asylum Claims" Version 6 2016 states as follows with respect to a Credibility Considering Late Disclosures at page 34 -35: "Consideration must be given to any possible reasons for not disclosing the issue of sexuality at the first available opportunity during screening. Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may have led some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon. While adverse inference should not necessarily be drawn from someone not having immediately declared their sexual orientation at the screening stage, failure to mention it at the main asylum interview, when there is every opportunity to do so, may call into question the credibility of the claim, unless there are very good reasons for not having mentioned it at that point. Each claim must be considered on its individual merits and all factors considered in the round. Any late disclosure must be fully investigated and the overall credibility of a claim considered 'in the round'. The A, B and C judgment prohibits the rejection of credibility when it is made only on this ground. Caseworkers must not therefore make an adverse credibility finding merely because the claimant did not rely on LGB grounds on the first occasion on which they claimed persecution there must be more weighing against the claim."

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I remit the appeal to the First-tier Tribunal for re-making with no findings preserved.

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.**

Signed: *Fiona Lindsley*  
Upper Tribunal Judge Lindsley

Date: 10<sup>th</sup> July 2018