Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01871/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 August 2019	**On 19 August 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

V. M.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. A. Smith, Counsel, instructed by Bindmans LLP
For the Respondent: Mr. L. Tarlow, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Hughes ('the Judge'), issued on 15 April 2019, by which the appellant's appeal

against the decision of the respondent to refuse to grant him international protection was dismissed.

2. The appellant appeals with permission of First-tier Tribunal Judge Povey by way of a decision sent to the parties on 3 July 2019.

Anonymity

3. The Judge did not issue an anonymity order. This is a matter in which the appellant has sought asylum. I am mindful of Guidance Note 2013 No 1 concerned with anonymity orders and I observe that the starting point for consideration of anonymity orders in this Chamber of the Upper Tribunal as in all courts and Tribunals is open justice. However, I note paragraph 13 of the Guidance Note where it is confirmed that it is the present practice of both the First-tier Tribunal and this Tribunal that an anonymity order is made in all appeals raising asylum or other international protection claims. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order:

> *'Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. 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 content of the protection claim.'*

Background

4. The appellant is an Indian national who is aged 36. He entered the United Kingdom in or around November 2012 as a student and enjoyed leave until 1 January 2015. He made an out-of-time application for further leave to remain on human rights (article 8) grounds and the respondent refused this application on 3 June 2015. The appellant made an asylum application on 15 March 2017, asserting that he faces a real fear of persecution upon his return to India consequent to his sexuality. He details that his family does not accept him as a gay man, and he is not able to live openly as a gay man around them. He further asserts that he could not internally relocate within India as members of his family are connected to both the police and the authorities and so he would not enjoy protection from any threat made by family members. The respondent refused the application by way of a decision dated 6 February 2019, observing that she did not accept that the appellant's

claimed sexuality was genuine. In any event, if he is gay there is no general risk for LGBT persons in India. Whilst there may be discrimination, this does not constitute persecution.

5. The appellant's appeal came before the Judge on 27 March 2019. The Judge determined that the appellant was gay but found that he was not being truthful as to problems experienced at the hands of family members and as to a maternal uncle having caught him in the act of sex with another man at the family home.

6. As to the later finding, the Judge reasoned at [40]:

> *'However, I found the appellant's account of him meeting another man for sex in the family home on a day when the family were away to be inconsistent, contrived and untrue. The account in his statement dated 11 January 2019 was that 'Anish' was a distant relative and he thought it would be safe for him to come to the family home because if anyone asked who he was he could just say he was a relative. No one was home. When cross-examined, it was put to the appellant that it was not reasonably likely that he would invite a man to the family home to have sex just because he thought the family were going out. I found that his account thereafter was contrived; he said that all of the family were all going to [a] marriage which was three hours [away], but after leaving his uncle had to change his plans as one of the cashiers in the family shop had not turned up for work.* ***I assessed*** *not only what the appellant said* ***but how he said it*** *and, even having regard to his mental health issues and any impact upon his ability to give evidence, I was satisfied that he was simply making up this explanation.'* [emphasis added]

7. The Judge proceeded to find that the appellant would be able to live free and openly as a gay man in India.

8. The appellant filed a notice seeking permission to appeal to the Upper Tribunal, relying upon grounds drafted by Ms. Smith. Several grounds were identified, including a complaint that the Judge erred in law:

> *'by over-relying on the appellant's demeanour and the way he gave his evidence at the hearing to reject his account about the incident when his uncle caught him at home with a man called Anish and/or failing to provide adequate reasons for rejecting this part of the appellant's account as 'inconsistent, contrived and untrue' at [40] and/or by making a material mistake of fact or misunderstanding the evidence about this incident.'*

9. JFtT Povey granted permission on all grounds observing, *inter alia,* that it was arguable that the Judge failed to adequately explain how he had assessed and weighed the appellant's demeanour in concluding that his account was fictitious at [40].

10. A rule 24 response was received from the respondent. It noted at [3]:

> *'In response to Ground 1, the respondent submits that the JFtT's adverse credibility finding at [40] was not based solely on the appellant's demeanour. It was open to the JFtT to disbelieve this part of the appellant's account as 'inconsistent, contrived and untrue' based on its inherent implausibility …*'

Decision on error of law

11. At the hearing Mr. Tarlow accepted on behalf of the respondent that the Judge materially erred in law in relying upon the appellant's demeanour when assessing credibility and that such material error of law adversely infected the decision as a whole.

12. The term 'demeanour' is used as a legal shorthand to refer to the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence. Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36, observed as to the concept that:

> *'witnesses … may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.'*

13. It is well-established in asylum and immigration law that demeanour is an unreliable indicator of credibility as the judiciary should doubt its own ability to discern from demeanour as to whether a witness is telling the truth: *R v. Secretary of State for the Home Department, ex parte Patel* [1986] Imm AR 208

14. The Tribunal has continued to warn as to the dangers of relying upon demeanour in assessing credibility, observing in *K (or B) (DRC)* [2003] UKIAT 00014 that judging demeanour across cultural divides in fraught with danger.

15. In *KB & AH (credibility-structured approach) Pakistan* [2017] UKUT 491 (IAC) the Tribunal confirmed the decision in *K (or B) (DRC)* and

confirmed at [33] that it will rarely be safe to attach significant weight to demeanour as a factor.

16. The Court of Appeal has recently considered the appropriateness of relying upon demeanour in *SS (Sri Lanka) v. Secretary of State for the Home Department* [2018] EWCA Civ 1391; [2018] Imm. A.R. 1348, [33] - [44]. At [36], Leggatt LJ confirmed:

> *'... it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth*.'

17. At [37] he further noted:

> *'The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter*.'

18. At [38]:

> *'Ms. Jegarajah emphasised that immigration judges acquire considerable experience of observing persons of different nationalities and ethnicities giving oral evidence and suggested that this makes those judges expert in evaluating the credibility of testimony given by such persons based on their demeanour. I have no doubt that immigration judges do learn much in the course of their work about different cultural attitudes and customs and that such knowledge can help to inform their decision-making in beneficial ways. But it would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.'*

19. Leggatt LJ concluded at [41]:

> *'No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight*

> *to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.'*

20. Upon carefully considering the decision and reasons in this matter, it is apparent that the Judge took great care to diligently assess the various strands of evidence before him. However, whilst being mindful that the appellant before him had mental health concerns, he placed weight upon his judicial evaluation as to the appellant's demeanour when assessing credibility. Whether significant weight was placed upon it is unclear when considering [40] as a whole, but it is sufficient to be an error of law in the circumstances of this appeal. Such approach led to the Judge not accepting that the appellant was being targeted by a member of his family and so no true consideration was given to the appellant's fear that his family's contacts with the police and authorities adversely impacted upon his ability to establish sufficient protection from those wishing to harm him or to internally relocate. The error of law was therefore material. The Judge's error penetrates to the heart of his findings on credibility and, as a consequence, there will need to be a determination of the appeal de novo.

21. Having found a material error of law as to ground 1, I do not proceed to consider grounds 2 to 5.

Remittal to the First-tier Tribunal

22. As to remaking the decision, given the nature of the error of law, I accept the submissions made by both Ms. Smith and Mr. Tarlow that clear findings will have to be made on the evidence presented.

23. Ms. Smith requested that the matter be remitted to the First-tier Tribunal. Mr. Tarlow observed that the matter could properly stay in this Tribunal.

24. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> *"7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:*
>
> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
>
> *(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal."*

25. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no adequate and fair consideration of his asylum claim to date.

26. In this case I have determined that the case should be remitted because a new fact-finding exercise is required.

Notice of decision

27. The Judge erred materially for the reasons identified. I set aside the Judge's decision promulgated on 15 April 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

28. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any Judge of the First-tier Tribunal other than Judge Hughes.

29. No findings of fact are preserved.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 12 August 2019