



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

Appeal Number: PA/06888/2018

THE IMMIGRATION ACTS

**Heard at North Shields
On 21st August 2019**

**Decision & Reasons Promulgated
On 5th September 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**OK
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rogers, instructed on behalf of the Appellant
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND DIRECTIONS

1. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly refer to him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.
2. The Appellant with permission, appeals against the decision of the First-tier Tribunal (Judge Maxwell) (hereinafter referred to as the "FtTJ") who, in

a determination promulgated on the 11th September 2018, dismissed his claim for protection and his human rights claim.

The factual background:

3. The background to the Appellant's claim is set out in the determination of the FtTJ at paragraphs 4-27 and in the decision letter of the Secretary of State issued on 24th March 2018.
4. The Appellant is a national of Myanmar. He entered the United Kingdom on 6 May 2002 with entry clearance as a student valid until May 2003. He applied for further leave to remain a student which was granted until January 2005. Upon application for further leave to remain, the application was refused on 18 February 2005 with a right to appeal. He appealed against this decision, but it was dismissed by the Tribunal on 3 March 2006 and he became appeal rights exhausted. On 19 December 2007 he was served with an IS 15 A as an overstayer and next came to the attention of the respondent on 7 June 2017 when arrested by the police on suspicion of fraud. On 12 July 2017 he was convicted of two counts of possession/control of identity documents with intent. He was sentenced to a period of nine months' imprisonment on 20 October 2017.
5. In August 2017 he made a claim for asylum.
6. In light of his conviction he was served with a notice of a decision to deport on 29 October 2017.
7. His claim for protection was based on his assertion that he was at risk on return to Myanmar as a result of political opinion imputed to him by the authorities, and on account of his sexuality. In a decision letter dated 24th March 2018 the Respondent refused his protection and human rights claim in the context of his deportation. As to his claim based on political opinion, the respondent set out reasons why he had not given a credible or consistent account of supporting the Karen National Union and his claim to have been arrested whilst in Burma was also rejected. As to his sexuality, the respondent considered that the appellant had given inconsistent and vague evidence relating to this issue and did not accept his account of his claimed sexuality.
8. The appellant lodged grounds of appeal against that decision. The appeal against that decision came before the FtTJ on the 29th August 2018.
9. At paragraphs 11 - 27 the FtTJ summarised the basis of the appellant's claim. The appellant's father had formerly been a supporter of a Christian rebel group. The appellant took part in anti-government protests and became more involved after two of his friends were shot by the military. He had delivered leaflets and was generally very active. One day the military went to his home and drove him to prison where he was ill-treated but had not been produced before any court. He was told he had been

arrested because he had been involved in demonstrations and was held for about 18 months in X prison before he was released because he refused to sleep and had become mentally ill. After his release he was able to sit his final exam and then went to live with his grandfather, but the military intelligence kept coming to his family home and they then discovered his grandfather's address. When the military came, his grandfather told the military had not been there. He was then advised to run away but was discovered hidden in a lorry. The appellant was further interrogated, and it was agreed that he should act as an unpaid military porter and was sent to cook for the troops. He was not paid for this forced labour. On a day when the fighting was intense, everyone ran away and the appellant escaped. He walked for five days where he managed to find a lift to a different state where he worked as a teacher for 2 to 3 years. The appellant left Myanmar for his own safety and obtained a student visa with the assistance of the Christian group and a friend and that his mother had given him some money to get a passport. He was able to travel in and out of Myanmar to visit his mother, the last occasion being in 2004 because she was able to arrange for a bribe of \$2000 to the immigration enforcement.

10. As to his sexuality, he had no relationship with either sex and only his mother knew of his sexuality as he had told when she was ill. He only realised his sexuality when his friend suggested it to him. He has never discussed any sexual relationships with his friend all told her about them. He had two relationships since he came to the United Kingdom.
11. In the decision promulgated on 11 September 2018 his appeal was dismissed. The FtTJ set out his findings of fact in relation to his protection claim at paragraphs 29 - 51. The FtTJ rejected his account that he had been politically active in the light of what the FtTJ referred to as "very significant inconsistencies" in the account provided which was set out at paragraphs 33 - 41 and included the appellant's ability to return to Myanmar after his claimed arrest on three return visits between 2003 and 2005. In relation to his protection claim based on his sexuality, the FtTJ set out his findings at paragraph 42 - 50 but having considered the evidence, including that of his witness at paragraph 47, did not find that the appellant had demonstrated his sexuality as claimed. He therefore dismissed the appeal on all grounds.
12. Permission to appeal that decision was sought and refused by the First-tier Tribunal (Judge Grant-Hutchinson) but was granted on reconsideration by Deputy Upper Tribunal Judge Davey on the 11 January 2019 for the following reasons:

"The grounds dated 7 November 2018 challenging the decision of FTT J Durrance dated 11 September 2018 at ground number one and two do disclose arguable material errors of law. It would be helpful to know the appellant's response, if the matters had been put the appellant, so as to assess the materiality of the claimed errors of law"

13. The appeal was therefore listed before the Upper Tribunal on the 23rd May 2019. At that hearing the appellant was represented by Ms Cleghorn of Counsel. As the appellant had changed his representation shortly before the hearing, Ms Cleghorn applied for adjournment which was granted by the Tribunal. A direction was made that any application made under Rule 15 (2A) relating to evidence relied upon must be filed and served within 14 days. The hearing was listed for hearing on 21 August. There had been no application filed pursuant to rule 15 (2A).
14. On the day before the hearing an application was made to adjourn the hearing and that the representatives had sought further information from counsel between May and August but were without counsels note which were necessary to determine what questions were asked of the appellant. That application was refused on the papers.
15. At the hearing listed on the 21st August, Ms Rogers, who did not appear before the FtTJ, appeared on behalf of the appellant and Ms Petterson, senior presenting officer, appeared on behalf of the respondent. She informed the Tribunal that she had not been able to comply with the direction made in May as the information had not been provided by counsel. However, that note was now available having been sent by email and she sought permission to rely upon it. In the circumstances she stated that she did not require an adjournment. Both the Tribunal and the presenting officer were provided with copies of counsel's note and time given to read the contents.
16. Whilst that evidence had not been filed and served in compliance with the directions made, in the light of its relevance to the proceedings and in the interests of justice, I was satisfied that the evidence should be admitted.
17. I am grateful for the submissions heard from Ms Rogers and Ms Petterson on the issues that arise in the two grounds advanced on behalf of the appellant. I confirm that I have considered those submissions in accordance with the decision of the FtTJ and the grounds which had been filed before the Upper Tribunal. I further confirm that I have given full consideration to those submissions which I have heard, and I intend to incorporate those submissions into my analysis of the grounds that are relied upon by the appellant.
18. There is no challenge made to the FtTJ's findings of fact that the appellant would be at risk on the basis of any political opinion. Neither is there any challenge made to the FtTJ's legal assessment of the deportation of the appellant. The two grounds advanced on the appellant's behalf relate solely to the credibility findings made by the FtTJ in relation to the issue of his sexuality.

Ground 1:

19. In the original grounds filed it was asserted that there was a procedural unfairness on the part of the FtTJ by placing weight on an inconsistency in the appellant's evidence which it is said was not put to the appellant.
20. The grounds referred to paragraph 43 where the FtTJ found the appellant's evidence to be inconsistent because he had stated in his interview that he had had no relationships with men or women but in the witness statement filed claimed to have been in two same-sex relationships. The judge stated at paragraph 43 that the appellant had not sought to explain this inconsistency. The grounds therefore assert that the reason for the failure to explain this inconsistency was because it had never been put to the appellant.
21. Ms Rogers on behalf the appellant no longer relies on this ground as set out above in view of counsel's note handed in at this hearing before the Upper Tribunal. In that note, written by counsel who appeared before the FtTJ and who also drafted the grounds for permission to appeal, he now accepts that he was incorrect in his recollection of events and accepts that the inconsistency referred to in ground one had been put to the appellant (see paragraphs 5 and 6 of counsel's note).
22. In the light of that acceptance, ground one cannot succeed as advanced on that basis. However, Ms Rogers sought to reformulate the ground. She submitted that by reference to counsel's note of the oral evidence, that the appellant did explain the discrepancy but that it was not considered by the FtTJ and therefore the FtTJ erred by failing to take into account material evidence.
23. Ms Petterson on behalf the respondent submitted that the formulated ground did not demonstrate any material error of law and the explanation given was simply that he did not say what was set out in the interview record and that it was open to the FtTJ to find that the appellant's evidence was inconsistent given the explanation provided.
24. I have carefully considered the submission made by Miss Rogers. To put it in context, it is important to consider the earlier findings of fact set out by the FtTJ before paragraph 43. At [37] the FtTJ referred to the "very significant inconsistencies in his account" and at paragraph 34 - 41 sets out the nature of those inconsistencies in the appellant's evidence that went to the core of his account. At [34] the FtTJ found that the appellant had made no reference in his screening interview of having been incarcerated, tortured and forced into labour by the military and at paragraph 35, observed that whilst the appellant claimed his father was "a fighter" in the screening interview, his case before the FtTJ was that his father was suffering from dementia (paragraph 35). At paragraph 36, the FtTJ made reference to his failure to mention his claimed forced labour on the battlefield where it was said he escaped from the authorities but that he had mentioned the forced work in a restaurant therefore the appellant clearly understood what he was being asked about. At paragraph 37, the judge considered his claim that his political activities increased as a

reaction to the death of his friends at the hands of the military and whilst he had referred to the men during the course of his asylum interview, the appellant made no mention of the fact that they had both been killed. At paragraph 38 the judge considered a letter provided in support of the appellant's claim but gave a number of reasons as to why the contents of that letter was significantly inconsistent with the appellant's evidence. At paragraphs 39 - 41 the judge set out his findings in relation to the appellant's claim to have obtained a passport after his escape from the authorities, and that the appellant had returned to Myanmar on three occasions since his escape. The judge did not accept the appellant's explanation that he was able to return at a time when he had been the subject of adverse interest by the authorities.

25. At [42], the FtT observed that the appellant failed to mention his sexuality during the course of his screening interview, however, the FtT did not hold this failure against the appellant and stated "accordingly, I do not find this particular omission of itself to undermine his claim. Having said that there are significant inconsistencies as between the account he now gives and his original account." At paragraph [43] the judge then set out one of those inconsistencies. The FtT made reference to the appellant's witness statement at paragraph 19 where he claimed to have had sexual relationship with two men in 2007 and 2015 and the FtT stated that "both claimed relationships predated his substantive asylum interview during the course of which at question 237, he was asked the direct question "have you had relationships with men or women?" His response was "no, only just in my mind. If I go out at night-time, I'm run fast." The appellant has not sought to explain this inconsistency which I find to be particularly significant."
26. There can be no dispute that the appellant's evidence is inconsistent on this issue and further it is now accepted that the appellant was asked about that inconsistency. Counsels note was not an agreed document in view of its late arrival and as no notice had been given to the presenting officer it had not been checked by a referral to the previous presenting officer. However, there is no reason to not accept the contents of that document, and it states as follows: -
- a. Asylum interview questions to 37 - have you had relationships with men or women? You say - no.
 - i. I replied yes
 - b. can you explain why your answer begins with the word "no"?
 - i. My reply was I have interest with men, not woman.
27. From those answers, it is clear that his explanation for the inconsistent evidence was that he had not said "no" and that he had given an entirely different reply to the question as to whether he had relationships with men and women.

28. In the light of the earlier adverse findings of credibility and in the light of the appellant's explanation which was in essence that the interpreter and the interviewer had written down completely the wrong reply given by the appellant, it was reasonably open to the FtTJ to conclude that he had not sought to explain this inconsistency. Reference had been made to the answer given in the interview at question 237 in the refusal letter at page 7. However there had been no reference made in the appellant's witness statement as the answer to Q237 being an error or any attempt to clarify the answer given prior to the hearing. At paragraph 43, the FtTJ referred to question 237 as a "direct question" with the inference being there was little or no room for any misunderstanding and there has been no challenge made in the grounds or the submissions to the answers to the questions and answers that followed.
29. Drawing those matters together, in my judgment ground 1 is not made out and the FtTJ's assessment was one that was properly open to him on the evidence.

Ground 2:

30. Ms Rogers relies on the written grounds. It is submitted that it was central to the appellant's claim that he was a subject of a sexual assault in prison and that the assailants knew of his sexuality and that was the reason for the assault but that the FtTJ at paragraph 45 engaged in speculation by stating that this claim was similar to the description of a sexual assault reported by Mr X on the appellant's behalf.
31. Ms Rogers submitted that this had not been put to the appellant and was therefore a procedural irregularity. She submitted that the language used by the FtTJ at paragraph 45 was "speculative" and made it clear that the FtTJ was relying on the coincidence between the two accounts. She therefore submitted that it was a material issue and one which had influenced the decision made by the FtTJ. It was a procedural irregularity which went to the issue of fairness.
32. Ms Petterson submitted that this was not the central issue as there had been no medical evidence or any evidence from the police. She submitted that the grounds did not undermine the FtTJ's overall findings where the FTT J had made a number of other adverse credibility findings in relation to the appellant's account of his claimed sexuality apart from this issue at paragraph 45.
33. I have carefully considered the submissions made in the context of the FtTJ's decision as a whole and the evidence before him. Whilst paragraph 45 is the paragraph under challenge, in fact the FtTJ began his consideration of the issue at paragraph 44 where he set out the appellant's claim and the oral evidence given by the appellant concerning the sexual assault. It is clear from reading paragraph 44 that the FtTJ had

considered the appellant's evidence in the light of the medical records before him and that the account given was not consistent with the evidence contained in the records exhibited at page 40 of the bundle. Those records refer to the caseworkers written note on 9 April 2018 referring to the location of the assault as not the prison but at a different centre. The note records on 26 April that the appellant gave a different account of the type of assault and the rule 35 report referred to an assault at the prison but gave a different reason for why the assault occurred which the judge made reference to at paragraph 44.

34. It is clear that in view of the inconsistent evidence set out in the written records that the FtTJ stated that he was not able to resolve this issue. He went on to refer to it being more than a coincidence that a similar factual claim had been made in a letter from Mr X (exhibited a page 15 of the respondent's bundle), concerning events which took place in Myanmar.
35. Paragraph 45 should be viewed not only in the light of paragraph 44 but also in the light of the contents of the letter itself which the judge considered at paragraph 38 of his decision. The letter set out an account of the appellant's arrest, being charged with an offence and sentenced to a period of 3 months imprisonment and that whilst in custody was forced into an assault. The FtTJ's assessment was that the contents of the letter was inconsistent with the appellant's evidence in material aspects; the appellant claimed that there was no court hearing but the letter referred to a sentence of three months, the name of the prison was different and the length of the imprisonment was also different and that the appellant had not referred to any forced assault. The FtTJ made reference to the same factual account set out in that letter relating to events in Myanmar and the factual account as to what occurred in the UK which he referred to as "a coincidence."
36. However when looking at the FTT J's decision, whilst at paragraph 45 he referred to it as a "coincidence" the FtTJ did not state that he placed any weight on that particular point as one adverse to the appellant and therefore contrary to the grounds there can be no unfairness to the appellant.
37. The FtTJ had the advantage of seeing and assessing the appellant and making an assessment of both the oral and the written evidence presented on his behalf. The judgment of Lady Hale in *AH (Sudan) v Secretary of State for the Home Department* [\[2007\] UKHL 49](#), [\[2008\] AC 678](#) emphasises this issue at paragraph 31:

"...This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [\[2001\] EWCA Civ 734](#), [\[2002\] 3 All ER 279](#), para 16. They and they alone are the judges of the facts. It is

not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

38. In my judgment, the grounds relied upon do not demonstrate that the judge failed to properly consider the evidence before him. Whilst those grounds seek to only challenge paragraphs 43 and 45, the decision should be read as a whole and the judge set out at paragraphs 33 - 50 his findings of fact and his assessment of the appellant's credibility and those which related to the issue of his sexuality at paragraphs 42 - 48. In that assessment the FtTJ made a number of adverse credibility findings when considering the appellant's account in the context of the evidence as a whole, including the evidence of a witness at paragraph 47.
39. In summary, the assessment made was one reasonably open to the FtTJ on the evidence, both oral and documentary, and it has not been demonstrated that the decision of the FtTJ involves the making of an error on a point of law. Therefore the decision to dismiss the appeal shall stand.

Notice of Decision

40. The decision of the FtTJ did not involve the making of an error on a point of law; the appeal is dismissed.

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

Date 27/8/2019

Upper Tribunal Judge Reeds