Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07423/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th January 2019	**On 1st March 2019**
Extempore Decision	

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

F H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Raza, Counsel instructed by Farani Taylor Solicitors
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh whose date of birth is recorded as 2nd January 1992. He first arrived in the United Kingdom on 7th February 2013. His leave was granted until 29th June 2016, though on 6th March 2015 his leave was curtailed. On 2nd February 2017 he claimed international protection as a refugee. The basis of his claim was that he was homosexual. The Secretary of State refused the application on 21st July 2017. He appealed. His appeal was heard by Judge of the First-tier Tribunal D Ross on 27th July 2018 sitting at Taylor House. Judge Ross found

the Appellant's account lacking credibility and dismissed the appeal. Not content with that decision by Notice dated 26th September 2018 the Appellant sought permission to appeal. At first instance Judge Grant-Hutchison refused permission on the basis firstly that the application was out of time and that in any event, there was no merit in the grounds. A renewed application was made to the Upper Tribunal and on 14th December 2018 Upper Tribunal Judge Perkins granted permission, thus the matter comes before me.

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 their 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.

2. The grounds run to sixteen paragraphs. Though Judge Grant-Hutchison refused permission, rather helpfully she has summarised what the Grounds of Appeal are and I use her summary for the purposes of this decision.

3. It was submitted that the judge erred:

   (a) by failing to apply the case of **HJ (Iran) [2010] UKSC 31** and the background evidence to the facts and circumstances of the case;

   (b) in not recognising the Appellant is a gay man he would be in danger on return;

   (c) by focusing too much on the Appellant's credibility without taking into account the evidence from the Appellant's friends which ought properly to have been taken on its own merits. Although there are some contradictions and anomalies in the Appellant's account, the vital point is that the essential core of his claim and account still stands, namely that he is gay;

   (d) by failing to take into account that the Appellant's relationship with his father had seriously broken down and that he would have grave difficulties at the hands of his family on an enforced return;

   (e) by failing to take into account the Appellant's gay-related activities in the United Kingdom and that there has been no attempt to belatedly concoct a case of his being a gay man;

   (f) by speculating the reason for the Appellant's delay in claiming asylum;

   (g) by not addressing important evidence/legal opinion of the CLP lawyer from Dhaka;

   (h) by failing to consider humanitarian protection, Article 3, paragraph 276ADE(1)(vi) and Article 8.

4. I am mindful of guidance given by McCombe LJ in the case of **VW (Sri Lanka) [2013] EWCA Civ 522** in which at paragraph 12 he said:

> *"Regrettably, there is an increasing tendency in immigration cases, where a First-tier Tribunal Judge has given a judgment explaining why he has reached a*

> *particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact".*

5. The core of the Appellant's case was that he formed homosexual relationships with two men in particular, one by the name of Alvi and the other by the name of Dhrubo. These relationships were discovered by the Appellant's father and sister respectively.

6. In refusing the Appellant's account Judge Ross pointed to a number of inconsistencies. The judge was concerned to note that although the Appellant was claiming that were he to be returned he would be prosecuted in respect of an offence involving a neighbour's son in Bangladesh, that was not mentioned at all in the statement produced for the Appellant for the purposes of the hearing. The statement for the hearing referred only to Alvi and Dhrubo. Judge Ross took the view that the activities with Akbar were in fact at the core of the Appellant's case because it was as a consequence of the risk of the prosecution being pursued against him on return that the Appellant was principally at risk. In his screening interview however, it was noted that the Appellant had said that he had never been accused of having committed an offence for which he could have been convicted.

7. There were various court documents upon which the Appellant sought to rely but the judge was of the view that such documents were easily obtainable in Bangladesh and so he was not willing to attach great weight to them. Further, Judge Ross considered that Akbar's father, whom it was said was responsible for the commencement of proceedings, would not have commenced proceedings implicating his own son when such would make public what had occurred and so disgrace the family.

8. In a letter dated 21st June 2017 the Appellant had stated as well as in interview that he had been threatened by fundamentalist Islamic organisations, yet again such was not mentioned in the statement.

9. Still further, the judge noted that the Appellant sought to argue that he was at risk because of an association with a man by the name of Julhaz Mannan who was murdered on account of his having started an LGBT magazine. This, in the judge's view, was a *cause célèbre*, but there was, the judge found, no sufficient evidence of association between the Appellant and the gay rights activists apart from some documents in respect of which the judge was unwilling to attach much weight.

10. The judge then went on to look at the timescale and noted that the Appellant did not claim asylum despite having considerable time to have done so until February 2017, about two years after his arrival in the United Kingdom.

11. If that were the end of the matter, I would have had no difficulty whatsoever in finding that this was a decision which was unimpeachable. However, the Appellant called two witnesses. The first, a Mr Sohel Ahmed who gave evidence not only that he knew the Appellant to be gay but also that he, Mr Ahmed, had had sex with the Appellant. Mr Ahmed described himself as a professional dancer and gay rights

activist. His evidence went further. Mr Ahmed said that he had seen the Appellant at a meeting of gay people and that he, Mr Ahmed, had seen the Appellant kissing a person which, though not stated by the judge, I take to be a man. Additionally, evidence was received from Rony Hussain. He gave evidence that he had met the Appellant in a gay club in December 2017. His evidence was that he had seen the Appellant indulging in sexual activity with a group of men.

12. The judge dealt with that evidence in this way:

> *"The most powerful evidence which the Appellant has brought to show that he is gay comes from the evidence of his friends. He claims that he is not in touch with his most recent boyfriend. I have carefully considered the evidence given by his gay friends of seeing him at gay clubs, and other events, but in view of the anomalies and contradictions in his case, I have come to the conclusion that I can place little weight on their evidence. For these reasons I conclude that the Appellant is not a homosexual and will not be at risk on return to Bangladesh".*

13. For the Secretary of State Ms Kenny submitted that the judge had considered all the evidence in the round and that at paragraphs 21 to 26 the judge was highlighting the inconsistencies. There was, she submitted, a particular inconsistency which she suggested undermined the Appellant's case to such extent that there was no material error in any event that could be identified in the decision. At paragraph 6 of his witness statement the Appellant said that he had not disclosed his homosexuality in his application to remain in the United Kingdom because he had been extremely hesitant to disclose the fact. He went on to say that he had preferred to hide the secret, though he went on to say that he was left with no alternative but to disclose it and forced to claim asylum because of the threats of his father. However, at paragraph 9 the Appellant was for saying that he had actively acted in a homosexual way when in Bangladesh. More particularly, at paragraph 9 of the Decision and Reasons the judge recorded that the Appellant had lived openly as a gay man since his arrival in the United Kingdom. If having arrived in the United Kingdom and having lived openly, then it made no sense that he was for saying that he wanted to hide the fact. Be that as it may, I am concerned by the manner in which the judge so readily dismissed the evidence of the two witnesses. Although this is not a medical case the guidance in the case of **Mibanga [2005] EWCA Civ 365** is apposite:

> *"24. It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. Mr Tam, on behalf of the Secretary of State, argues that decisions as to the credibility of an account are to be taken by the judicial fact-finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact-finder's function in assessing credibility. I agree. What, however, they can offer, is a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. What*

> *the fact-finder does at his peril is to reach a conclusion by reference only to the Appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence".*

14. I appreciate that the evidence of the two witnesses was not expert evidence but equally, where in my judgment the judge erred was to conclude that the two witnesses could not be credible because the Appellant's account had inconsistencies within it. One did not necessarily follow the other. The core of the Appellant's case was that he was homosexual. The questions that the judge might have asked himself were why would two men both come to the Tribunal to give evidence that they were homosexual, and in the case of one of them that he had engaged in homosexual sex with the Appellant? Still further, there was evidence that the Appellant had been associating in gay company. Of course, the fact that someone is heterosexual does not mean that they might not have gay friends but in what circumstances did the Appellant find himself if it were the case, that he was attending gay meetings? In other words, there was a failure on the part of the judge sufficiently to analyse the evidence given by the two witnesses other than to reject it on the basis that the Appellant's evidence lacked credibility. This was a flawed approach.

15. I find that the error is material because whether or not the Appellant is gay is at the very core of the case. The rejection of the evidence of two witnesses on a flawed premise clearly puts the finding in jeopardy, indeed so much so that I set it aside to be re-made. I have considered whether I can re-make the case but without actually having seen those witnesses, and without there having been a more thorough investigation of the concerns to which I have alluded, I do not feel that I am able to make the finding without more that the Appellant is homosexual. In the circumstances the better course in my view is to set the decision aside to be re-made before another judge in the First-tier Tribunal to be listed at Taylor House, not before Judge Ross. As I understand it no interpreter was required but it may be that enquiries should be made of the solicitors to ascertain whether in fact that is the case.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside to be re-made in the First-tier Tribunal by a judge other than Judge D Ross.

Signed **Date: 27 February 2019**

Deputy Upper Tribunal Judge Zucker