**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/09650/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12 April 2019** | **On 23 April 2019** |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**DR H H STOREY**
**JUDGE OF THE UPPER TRIBUNAL**

**Between**

**K B**
**(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Miss M Harris, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

The appellant appeals with permission against the decision of the First-tier Tribunal promulgated on 7 November 2018, dismissing his appeal against an asylum decision.

The appellant is a citizen of Ghana. His case is that he is a gay man and a grandson of a tribal chieftain and as a result he is at risk of persecution on return to Ghana. It is also his case that, given his social and prominent

position, he is at more risk than would be the generality of people or, for that matter, gay men in Ghana. The respondent did not accept that the appellant is gay or that he would be at risk on return.

The judge did not accept that the appellant is a gay man or that his account was credible. The challenge to the judge's decision is brought on three principal grounds:

the judge acted unfairly in embarking upon cross-examination of the appellant, thereby giving rise to the appearance of apparent bias.

the judge failed to have regard to the relevant guidance when determining the credibility and failed to have regard to material evidence. This falls into two separate categories, that is primarily, a failure to have regard to the evidence and guidelines regarding sexuality put forward by the UNHCR and second, a failure to have regard to the country expert evidence on chieftaincy in Ghana, which is said to be relevant.

the judge erred in adopting the wrong approach to an evidential burden on the appellant.

We must add, first, that Miss Harris quite properly, acting on instructions from her client, sought permission to rely upon an additional ground of appeal, which is that the judge had improperly made reference to Section 8 of the Asylum (Treatment of claimants, etc) Act 2004 in that he had improperly drawn inferences in delay between the appellant's arrival in the United Kingdom and his subsequent claim for asylum. We refused permission to do so on the basis that we are not satisfied that it would be proper to allow an amendment of the grounds on this point at such a late stage in the proceedings when there has been no proper explanation for the delay, nor do we consider that it would have made, in any event, any difference. The judge was entitled to consider the circumstances of the appellant's claim and the delay, as part of the overall findings as to credibility; there has to be a starting point, and there were, as the judge identified, numerous inconsistencies in the appellant's account.

Turning then first to ground 1, which Miss Harris characterised as being a part of an overarching submission that the decision was, when looked at in the round, unfair, both in terms of questioning and in the approach to somebody whose sexual orientation was at the core of the claim, given the guidance set out by UNHCR and which is referred to in the skeleton argument before the First-tier Tribunal and is also referred to in the grounds at [12] and [13].

Ground 1 is in effect an allegation of apparent bias. The relevant test is set out and identified in Ortega (remittal; bias; parental relationship) [2018] UKUT 298 (IAC), and Alubankudi (Appearance of bias) [2015] UKUT 542. It is this:

> "The question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"

It is part of that test that the court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased.

Dealing first with the nature of what is said to have occurred at the hearing, we observe first that there is no witness statement from counsel who represented the appellant before the First-tier Tribunal. That is unfortunate, given that it is that the burden is on the appellant to show the circumstances which may give rise to an appearance of bias. Second, and perhaps more importantly, we do not have a copy of counsel's note of what happened at the hearing and so we are unaware of whether there was any objection made to the line of questioning made, nor can we be certain as to whether the questions were put by the judge during cross-examination or whether they were, as is advised by the case law, put after any re-examination by his Counsel.

We have considered the questions as recorded in the decision but we consider that they do not, either singly or cumulatively, amounts to giving the appearance of bias. We do not find here that there is anything which shows that the judge was following a line of questioning or an issue which had not been raised by the appellant. As Mr Jarvis submitted, the issues raised were in relation to the complex set of facts about how the appellant had obtained a visa and the visa application process. While we accept that these were dealt with in the supplementary witness statement of 3 October, we do not consider that the questions were improper. We bear in mind that his appeal, relates to the sensitive issue of someone's sexual orientation and that the appellant comes from a country in which, it is accepted, that could cause serious difficulties, but we are not persuaded that on any view could it be said that the test to show that there was an apparent bias is met in this case. Accordingly, we are not satisfied that ground 1 is made out.

We should add that Miss Harris also raised with us, and quite properly, as it set out in paragraph 3 of the grounds, that there are a number of errors in the decision in that the Counsel has incorrectly referred to Ms Nizami and that there is a reference to a direction for proceedings to be heard in camera, which was not requested. We consider that these are nothing more than unfortunate errors which should not have occurred but we do not consider that they add materially to the appearance of unfairness or bias or otherwise amount to an error of law let alone one capable of affecting the outcome.

We turn next to ground 2(a). We accept that the UNHCR's guidelines are relevant to the facts of this case and are relevant to the assessment of an individual whose sexual orientation is in issue. We accept also that they were referred to in the skeleton argument put to the judge prior to the hearing. We consider that this ground is not made out, for the reasons which we now give.

First it is said that the judge had, as is averred in the grounds at paragraph [9], drawn inferences adverse to the appellant about his description of his first sexual experience. It is also averred at paragraph [8] that the judge had drawn improper inferences regarding a detailed account of whether he had or had not had a relationship with a woman or, as is described, a girl. We consider in these respects that first, what is said about this issue is simply a minor matter in the overall context of this decision, which sets out a in detailed and cogent findings with respect to inconsistencies which are identified at paragraphs [38] and [39] and summarised at paragraph [40].

We consider also that what is said at paragraph [35] differs in an important aspect from what is quoted in the grounds at paragraph [9] of the grounds. What is said at paragraph [35] needs to be seen in the context of what the judge says at paragraph 34, which precedes it, the sentence at the beginning of 35: "He was also vague about matters such as how the relationship began, saying he went to Justice's house, and after eating 'we started'". It also, in the quotation at 9, omits the final two sentences:

> "He said he and Justice only discussed the fact that each other were gay and had feelings after they had already had sex. I find it inconsistent, with what the appellant says are attitudes towards sexuality, that he would not want to be sure it was safe to reveal his attraction to Justice before having sex with him."

With regard to whether the judge overall failed to have proper regard to the guidance, we note from what the judge wrote that in fact he did have regard to it. There is shown in his reference to cultural, social and religious attitudes towards homosexuality in Ghana and that this was something which he was taking that into account. Similarly, at paragraphs [33] and [34] the judge makes reference to the difficulties that somebody may have in explaining conceptual and deeply personal ideas such as sexuality and it is also evident that he refers to the issue, perhaps in more neutral terms, at paragraph [15] of his decision.

Further, contrary to what is averred at paragraph [14] of the grounds, we consider that in this case the judge had not based his decisions on the inconsistencies identified at that point but on a whole number of inconsistencies which the judge was entitled to find and gave good reasons for finding undermined the whole of the claim. These are internal inconsistencies in the timelines of events and how he obtained a visa. It was not improper for the judge to make findings with regard to credibility on that basis.

Turning then to the second limb of ground 2, we accept that the judge does not directly refer to the expert report of Dr Lawrence. We accept that that report is persuasive evidence that the appellant is who he says he is and is a member of a royal family if taken in isolation. We have considered the passages to which Miss Harris very carefully took us at paragraphs [29] to [31] and [78] to [81]. We accept that these show that the appellant as a member of that family would be under great scrutiny and that the risk to him as a member of that family were it to be discovered that he is gay would be greater than for the generality of gay men in Ghana. We do not, however, accept that this evidence or the report as a whole is relevant to the fact-findings in this case which relate primarily to inconsistencies.

Whilst we note that Miss Harris pressed on us that the appellant would be under greater scrutiny, that is not something which is necessarily borne out by the report of Dr Lawrence and we have not been taken to any passages which would, for example, explain the attempted poisoning which the appellant recounts. Accordingly, we are not satisfied that the judge's failure or apparent failure to engage with the report of Dr Lawrence is capable of amounting to any error because what is said in Dr Lawrence's report is not, for the reasons we

have given, relevant to the issue of whether the applicant was gay and, as Mr Jarvis submitted, if it was the case that the appellant was or likely to be under greater scrutiny it does raise questions as to why he was to a significant degree reckless in bringing his partner to his home, which was relatively small, and having sex in a room that was not locked.

In summary, while we accept that the judge did not expressly refer to the report of Dr Lawrence, this was not material as it did not address or explain the inconsistencies in the appellant's testimony.

We turn next to ground 3. We do not consider that in this case the judge was unfairly requiring corroboration. We consider that what the judge wrote at paragraph [26] of his decision was fairly drawing attention to an apparent implausibility in the account given by the appellant whereby he had, despite the need to be careful, left in his home a mobile phone which was unlocked and without a password. Whilst the judge does say that such a possession, that is, the phone, could be a crucial piece of evidence that could create real problems for him, that is, we consider, clearly a reference to problems for him in Ghana. We do not consider that the judge was unfairly requiring him to have brought the phone as corroboration, and to that extent, the ground is misconceived.

We have, out of caution, considered also the alternative submission made by Miss Harris that the judge was drawing improper inferences but we do not consider, viewing the decision overall, that it was unfair for the judge to consider that this apparent inconsistency in behaviour was implausible or lacking in credibility.

Viewing the decision as a whole, we do not consider that there has been an inappropriate failure to take proper account of the UNHCR guidelines with regards to assessing sexual orientation or that the decision is otherwise flawed or unlawful, and for these reasons, we find that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

We maintain the anonymity direction.

**Notice of Decision**

1. The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed Date 17 April 2019

Upper Tribunal Judge Rintoul