Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12950/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 April 2019	**On 11 April 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

IA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Butler, Counsel, instructed by Harrow Law Centre
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 19 December 2018 of First-tier Tribunal Judge G Jones QC which refused the asylum appeal of the appellant.

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2. 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 the protection claim.

3. The background to this matter is that the appellant was born in Saudi Arabia to an Afghan family who had relocated some years prior to his birth. The appellant maintains that as he approached adulthood in Saudi Arabia he realised that he was gay and had two relationships with men. His sexuality was discovered by the father of one his partners who told his own family members. His asylum claim was based on a fear of mistreatment on the basis of his sexuality on return to Afghanistan.

4. The appellant obtained a visa to come to the UK valid from 10 December 2017 to 10 June 2018. After coming to the UK as a visitor, he claimed asylum on 3 May 2018. His residency permit for Saudi Arabia expired on 11 July 2018. The respondent refused the asylum claim in a decision dated 29 October 2018. The same decision indicated that the appellant was entitled to humanitarian protection under which refer to leave under paragraph 339C of the Immigration Rules.

5. The appellant appealed to the First-tier Tribunal and had a hearing on 10 December 2018. As indicated above, a decision dismissing his appeal was issued on 19 December 2018. The First-tier Tribunal found that the appellant was not gay and on that basis dismissed the asylum appeal. On 9 January 2019 the First-tier Tribunal granted permission to appeal to the Upper Tribunal.

6. There were six grounds of appeal, none of which were expressly stated to have no merit by the First-tier Tribunal and which all fell to be addressed here, therefore. The grounds were summarised in paragraph 2 of the grounds of appeal:

    (i) The judge failed to give any weight to the relevant evidence of Ms Nasim of UKLGIG, who worked with the appellant and confirmed his sexuality in her oral evidence at the hearing.

    (ii) The judge rejected the appellant's attendance at UKLGIG meetings as "self-serving".

    (iii) The judge made no reference to evidence submitted post-hearing, despite granting permission to the appellant to file those materials and a 63 page bundle being provided to the Tribunal on 14 December 2018, prior to the issuing of the decision.

(iv) The judge sought to go behind the respondent's grant of humanitarian protection, wrongly referring to it as "discretionary leave".

(v) The judge refused to place any weight on the statements adduced on the appellant's behalf by other witnesses who gave evidence to the effect that he was gay and in fear of family members.

(vi) The reasoning was, in parts, speculative, in particular concerning whether the appellant's father would disclose his sexuality to other family members given the shame of such a disclosure in a culture such as that in Afghanistan.

7. It is expedient to address ground three first. It was accepted for the respondent at the hearing before me that the First-Tier Tribunal had agreed to further documents being submitted after the hearing and had provided the appellant's legal representative with an email address in order for this to happen. The Presenting Officer's note on the respondent's file confirmed this to be so.

8. The respondent also accepted that the additional materials had been sent in time for them to be considered by the First-Tier Tribunal before the decision was made. The Tribunal file contained a printout of an email from the appellant's legal representatives sent to the judge and the respondent on 14 December 2018, exhibiting the further bundle comprising 63 pages. The Tribunal file also contains a hard copy of the 63 page supplementary bundle, sent under a covering letter dated 18 December 2018. The covering letter indicates that:

> "Further to the hearing on 10/12/18 and as directed by First-tier Judge G Jones QC we now enclose the following:-
>
> - Legal rep's statement of truth (and annexes)
> - Additional bundle of documents
>
> We confirm that this documentation was served by email on 14.12.2018".

9. The respondent agreed with the grounds in so far as it was an error for the First-Tier Tribunal not to have taken these further materials into account. The ground was not conceded where it was not the respondent's view that the further materials could have made a material difference to the outcome of the appeal.

10. Procedural fairness requires that the totality of a case is considered by the decision maker. Here, having given express permission for further materials to be submitted, the First-Tier Tribunal did not take the additional materials into account. That is a procedural unfairness.

11. Further, where deciding on the credibility of an asylum claim and a claim to be gay is necessarily a holistic assessment, it is not possible to find that

the further materials would have had no effect on the outcome of the appeal. The new materials contained a witness statement from the appellant's legal advisor confirming that it had not proved possible to access an old Facebook account showing the appellant together with one of his partners in Saudi Arabia. This witness statement went directly to the adverse findings made in [21]-[22] and [30(iv)] and it is not possible to say that it could not have affected those conclusions. The new material also included a statement from the appellant's brother corroborating the appellant's claim and directly addressing the actions of the father of one of the appellant's partners and what his own family members had done after learning of the appellant's sexuality. These issues were the subject of highly adverse findings by the First-Tier Tribunal at [25]-[26] and [30(iii)] and, again, the new material had the potential to lead to a different assessment.

12. Lord Mustill stated that what fairness demands in any given case is dependent upon the particular context; R v Secretary of State for the Home Department, ex parte Doody and Others [1994] 1AC 531. I am satisfied that a requirement of procedural fairness here was for the new materials to be considered, additionally so where those materials were capable of leading to a different outcome.

13. I therefore find an error on a point of law such that the decision must be set aside. As above, where the credibility assessment is a holistic exercise, it is not possible to preserve any of the credibility findings as the First-Tier Tribunal may have taken a different approach to other aspects of the evidence if all of the materials had been considered. The re-making of the decision is therefore *de novo* and where there are no findings of fact extant it is appropriate for it to take place in the First-Tier Tribunal.

14. If more is needed, it was also my conclusion that other grounds of appeal had merit, for example, grounds one and two. At paragraph 30(vi) the judge stated that he placed no weight on the evidence of Ms Nasim from UKLGIG, finding that her evidence was "nothing more than her subjective opinion" which was "based on nothing more than meeting the appellant and talking to him about his concerns and needs". He goes on to state:

> "In my judgment she is no better placed to assess somebody's sexuality than the average man on the Clapham omnibus".

15. The grounds refer to the guidance of the Court of Session in **TF and MA v SSHD [2018] CSIH 58**. That case concerned the evidence of members of an appellant's congregation as to the genuineness of a claimed conversion to Christianity. The court held:

> "[Such witnesses] will be able to say that, in their opinion, based on their experience of this individual and many others, the individual in question is or appears to be genuine (or in other cases, they are not satisfied, or not yet satisfied, of the genuineness of their self-proclaimed faith). This, in our opinion, is admissible opinion evidence which is entitled to respect".

16. Here, Ms Nasim's witness statement dated 19 September 2018 set out her contact with the appellant and how she had reached her assessment which went beyond talking to him about his concerns. Her statement indicated that not all those who approach the UKLGIG are given a place in groups but that the appellant was. Ms Nasim commented that he had been taken as a credible and trustworthy person by the other gay members of the group which he attended. Ms Nasim then went on over six paragraphs to explain the background to the organisation and her involvement with it since 2016. She indicated that "UKLGIG only write supporting letters in specific and limited circumstances, indicating that they "do not provide supporting letters or even letters confirming attendance for everyone that attends any UKLGIG event or service". She goes on to state:

> "The individual UKLGIG staff member or volunteer must have worked with the individual over a sufficient time period and with sufficient openness and frankness on behalf of the client for us to be able to say with confidence that the person's sexual orientation or gender identity is as they claim. This process can take longer with some clients and some are not ready or able to engage with us in that way".
>
> "Clients would need to meet this requirement in order to obtain a supporting letter. UKLGIG will refuse to provide a supporting letter where it is not in accordance with our policy".

17. In my view the care taken by Ms Nasim to set out the wider basis for her opinion went materially further than merely giving a view after speaking to the appellant. The fact of her view being based on a number of other factors and the policy of the organisation on providing such supporting statements were matters that the First-Tier Tribunal should have taken into account before finding no weight attached to her evidence.

18. The second ground of appeal challenged the finding that the appellant's attendance at UKLGIG meetings was self-serving. At [30(v)] the First-Tier Tribunal stated:

> "The appellant's attendance at groups frequented by homosexual men was not something that he sought out. The appellant was advised to attend such groups by his solicitor, plainly with a view to his attendance being prayed in aid as some kind of evidential support for his claim to be homosexual. I take on board the fact that the appellant readily accepted that he had attended such groups upon the advice of his solicitor, as being to his credit. Nonetheless, the preponderance of the evidence leads me to conclude that this additional 'evidence' is contrived and self-serving".

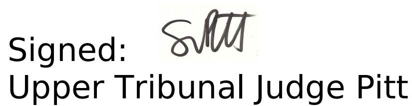
19. The difficulty with this finding is that was no evidence before the Tribunal stating that the solicitor had advised the appellant to attend meetings "plainly with a view to", in effect, bolstering his asylum claim. This is not a finding that can be made lightly about a legal adviser where there was no supporting evidence that this was the motive behind the suggestion that the appellant go to UKLGIG. The conclusions drawn on this part of the evidence were speculative and undermined thereby.

20. For all of these reasons, the decision of the First-tier Tribunal discloses an error on a point of law such that it must be set aside to be re-made. There is a procedural error regarding the additional materials provided to the Tribunal after the hearing not having been considered at all. The adverse credibility findings cannot stand and require a *de novo* re-making. The appeal will be matter to be remitted to the First-tier Tribunal to be re-made afresh.

Notice of Decision

21. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made by the First-tier Tribunal.

22. The re-making of the appeal should take place at a First-Tier Tribunal hearing centre in London in order for witnesses for the appellant to attend.

Signed:  Date: 9 April 2019
Upper Tribunal Judge Pitt