Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14026/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 28 June 2019	**On 19 July 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR B A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Rashid, Counsel, instructed by Mamoon Solicitors
For the Respondent: Miss E Groves, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant, a national of Pakistan, has permission to challenge the decision of Judge Durance of the First-tier Tribunal (FtT) sent on 12 February 2019 dismissing his appeal against the decision made by the respondent on 12 October 2018 refusing his protection claim. The basis of the appellant's asylum claim was that he would be at risk on return to Pakistan because he was a gay man. The judge did not find that he had given a credible account of his gay identity.

2. The appellant's grounds of appeal, lack clarity but contend that the judge had erred in:-

1) his treatment of the issue of the appellant's age;

2) his treatment of the evidence of Mr [W], which he said he accepted.

So far as concerns Mr [W], the judge had a witness statement from him and also heard oral testimony from him. He summarised Mr [W]'s evidence at para 47 as follows:

> "Mr [W] gave evidence and confirmed that he had known the appellant since spring 2018. He stated that he had seen the appellant a couple of time at Icebreakers and knew the appellant somewhat better than [K S] as his English was better. In cross examination he indicated that he had seen him once outside Icebreakers when the appellant had invited him to a basement sauna. I asked Mr [W] about this. He indicated that he had seen the appellant in the sauna and that he had seen the appellant going into a cabin and that his presumption was that he was going into the cabin to have sex. He stated that [K S} was not there but that he made no judgement about that as he himself had had relationships which were semi-open and that he took the view that that was a matter for the appellant and [K S]."

When later evaluating the evidence, having attached little weight to the evidence of the appellant and other witnesses, the judge's treatment of the evidence of Mr [W] included the following passages:-

> "84. That leaves the evidence of Mr [W]. Essentially, I have an appellant who I have determined has lied about events in Pakistan and has fabricated a relationship in the United Kingdom in order to remain in the United Kingdom. The appellant is arguing that he is now in a relationship with another asylum seeker who has been found as having lied about his sexuality at all costs in order to stay in the United Kingdom. Set against that I have the evidence of an independent witness who says that he has seen the appellant in a gay sauna going into a cabin where he presumed that the appellant went on to have sex.
>
> …
>
> 88. Notwithstanding these reservations [which concerned the fact that Mr [W] had said he had given evidence in a number of asylum appeals] I accept his evidence. I accept that Mr [W] has seen the appellant in a gay sauna. I accept his evidence that he saw the appellant go into a cabin. I accept that he has seen the appellant and [KS] attend a number of meetings at Icebreakers and I accept his evidence that he believes the appellant to be a gay man.
>
> 89. However, I do not find that this proves to the lower standard of proof that the appellant is a gay man. The appellant and [KS] have a chequered immigration history. Mr [W] is entirely unaware of their history and whilst his evidence may be in good faith it is one dimensional and superficial. Both men have been found to have been

> dishonest on core issues. I have determined that the appellant will say anything if he believes that it will secure immigration status in the United Kingdom.
>
> 90. Given these findings, I do not accept that the mere act of visiting a gay bar or sauna is sufficient to discharge the burden of proof. In addition, the mere fact that the appellant went into a cabin does not mean that he had sex. That is a presumption that Mr [W] was entitled to reach but he makes that presumption without being in the full possession of the facts or immigration history of the appellant. In my judgement, something more qualitative is required. I find the evidence of a loving and lasting relationship is the most persuasive evidence and that such evidence is absent. I do not consider that Mr [W]'s evidence of seeing the appellant in a sauna alters that conclusion given the determination displayed by the appellant to secure status at any cost."

I turn to the grounds.

3. I find ground 1 devoid of merit, since the issue of the appellant's age was peripheral to the reasons given by the judge for dismissing the appeal.

4. It is only the second ground (ground 2) that was advanced by Mr Rashid. He submitted that the judge's error in this connection arose from a misunderstanding of the evidence actually given by Mr [W]. The judge thought Mr [W]'s evidence was that he saw the appellant enter a cabin in a gay sauna, whereas, submitted Mr Rashid, Mr [W] had actually said that he had had sex with the appellant in this cabin. In support of this submission he submitted a supplementary statement from Mr [W] prepared post-hearing and submitted with the written grounds of permission.

5. It is a general rule that evidence adduced after a hearing cannot demonstrate an error of law on the part of a judge who can only consider the evidence that is before him.

6. However, a well-established exception to that rule arises if the judge is considered to have mistakenly understood/recorded material evidence. In order to assess whether that is in fact what happened here, it is important to set out the relevant documents:-

7. <u>Mr [W]'s Statement of 30 November 2018</u>

This statement was as follows:

> 1, [Mr] [W] of […] state as follows:
>
> **Declaration**
>
> **I make this statement in connection with the asylum claim of [B A]. Its contents are true to the best of my knowledge and belief.**
>
> 1) I am a British citizen [aged 61] …. I worked for 29 years for the Environment Agency and predecessor organisations, taking early retirement April 2015. Since

then, I work around six days per month as a volunteer for George House Trust, a HIV charity based in Manchester. Since Sept 2016 I've volunteered weekly at English language courses at St Johns Centre in Old Trafford, working with asylum seekers, refugees and others needing better English to make social contacts in Greater Manchester.

2) I first met [B A] in April 2017 at 'Icebreakers' which meets weekly at the LGBT Foundation in the Manchester gay village, with typically 15 to 30 guys there. It is "a mutual support group that caters for gay and bisexual men – 18 years or older – who are 'coming out', as well as men who are already 'out' but new to Greater Manchester or having feelings of loneliness or isolation. New prospective members of Icebreakers are interviewed at their first visit to the group, to explore the reasons for them coming, and find out how they can benefit and fit into the group. In this way, new members are in effect 'screened' to see they fit into its target of helping gay or bisexual men.

3) I go to Icebreakers around 2-3 times per month, and see [B A] quite often there. I have also met his partner [K S] at Icebreakers, and met them both once at 'First Wednesday'. This is a monthly information and support group for LGBT people who have come to UK or seek sanctuary here on account of their sexuality and the risks they'd run at home if discovered or living openly as gay. Wednesday is my volunteering day at George House Trust, so I'm not often at First Wednesday, but I know a few of the guys who do attend. [B A] also goes to PLUS group (People Like Us, Stockport) a monthly meet up for LGBT people which I've been to once this year.

4) [B A] and [K S] have volunteered with the LGBT Foundation, at Manchester Pride 2017 and [B A] bucket-collected money at Manchester Pride 2018. I've talked with [B A] about his time in Manchester since coming in December 2011 on a study visa. I asked him about his gay history since then, as he's more able to be open here, and about when [B A] started venturing into the gay world. He said that his limited English before 2014 had restricted this, and that he met [K S] about 3yrs ago and of course they don't have to rely only on English. His English level is now reasonable but I can understand this reasoning, as 'chatting up' and building trusting relationships needs some level of fluency. [B A] however seems fully at ease with me and the guys at Icebreakers. They've lived together in [W] since 6 July 2018.

5) [B A] says he lived with his uncle since 2014, who now knows [K S] and about their gay relationship. In July 2018 [B A] and [K S] moved in together with [K S's] uncle. Both families are OK about them living together. I believe that [B A] is a gay man and that he'd be at risk in Pakistan, under either the former or the new Imran Khan government. I am happy to speak further on this if required.

[Mr] [W] 30 November 2018

8. The Judge's Record of Mr [W]'s Evidence at the hearing

I could not locate this during the hearing but have now consulted it. It is necessary in the circumstances to set out the relevant passages recording Mr [W]'s evidence in full. It will be apparent that it is not easy to follow the judge's shorthand.

"Mr [W]

P.30.

Happy to use it – para 5 – not a blood uncle –

Language ? . – English.

How long known [B A]? since spring 2018 – April – started gay to Icebreakers –

What relationship? See each other couple of times pcm at Icebreakers – nearly always together – know [B A] better as his English is better – meeting sometimes go across – The Molly House – over the road.

Why so sure [B A] is homosexual? Very clearly touchy feely – a lot of body contact as is [B A] himself. Meet - ? – v. close – [B A] is more outgoing of the two – body language – happy that gay ? .

Ms Newton

What pos – hold? Ordinary member.

How often see o/ ? Icebreakers? Once invited – to basement sauna – both been to last year – met @ meals – basically Icebreakers and Molly House.

Been to ? address? No.

RXN? No.

Say invited to basement sauna – did see them? It was [B A] – DNK how many would be – not surprised just [B A] – went into sauna not together – I was late – I caught up with him – went into the sauna – but spent much time in sauna – went into T.V. room – then went into area with cabins – clear where he was and that he was having sex – I have had relationships which were semi-open – it is up to [K S] and [B A] – how they live their relationship – don't want to do anything that damaged that.

Anything missing? X (x 2).

FINISH."

9. The Presenting Officer's Record

At the hearing before me, Miss Groves said she was happy to produce the Presenting Officer's Note of Proceedings. It was very detailed and gave every indication of being a verbatim record, although I am not in a position to be sure about that. In relation to Mr [W], the relevant part of the record reads:

> "IJ invited to basement sauna did you see them there? Just [BA] I saw it was probably both of them were coming but just [BA] turned up. I was running late so we arranged I would catch up with him. I went into sauna chatted for a bit went to TV room and drifted out it was clear from the way he was that he was up for having sex. I have had relationships that have been semi open its up to them how they manage their relationship they appear happy together."

10. The Supplementary Statement from Mr [W]

Submitted with the grounds seeking permission to appeal the judge's decision, was a further statement from Mr [W]. In its relevant part it states:-

> "I refer to Paragraphs 84-90 of Judges Decision, which I feel have omissions which are central to, and material facts of the issue of whether the Appellant is a gay man or not.
>
> The Decision Notice describes my response to a question as that I merely witnessed the Appellant going into a cabin at a gay sauna, and that I then presumed the Appellant to be having sex [with some other unknown person] in the cabin.
>
> On the contrary: in my answer to the Judge's questioning of (I think it was phrased as) Where, apart from LGBT Foundation I'd met the Appellant:
>
> - I described the circumstances how the Appellant had suggested we meet up at the gay sauna;
>
> - that in the premises the Appellant and myself met in the sauna itself, and then soon went into a private cabin.
>
> - I stated that the Appellant and myself had sex with each other in this cabin. Within the boundaries of what can be said in a Tribunal about sexual activity, my description of events as an independent witness were clear and unambiguous: that is, that the Appellant and I actively had sex. This is in paragraphs 84, 88 and 90.
>
> I stated that the visit to Basement sauna was in December 2018. I've now found the SMS thread that confirms the correct date of visit was on Wednesday

21 November 2018. I was unsure from the Appellant's level of English whether he wanted me to refer to this sauna visit in my Statement of 30/11/18, or how his partner or other Witnesses would feel about this. We subsequently talked more on this in January with a friend who helped with good English and Urdu translation.

I have now provided Screenshots of the Appellant's and my messages around 21 November.

In more detail:

Paragraph 84

The Decision Notice describes me seeing the Appellant go into a cabin and presumed him to have sex there. However, I and the Appellant ourselves went together into the cabin and we did have sex.

I described in the Tribunal how the Appellant had suggested we meet up at Basement gay sauna in Manchester, and that I'd wondered if he meant to meet with him alone or with his partner. I stated it turned out the Appellant was alone, but I'd myself had couple of longish term relationships which had been a little bit 'open' and it didn't seem odd as I knew the Appellant and partner had apparently been to this sauna together.

I stated that I had been running late so the Appellant was already in the sauna itself, so we didn't chat long in the heat but moved to TV lounge and then to private cabins. It was at this point I recall using the phrase "He seemed up for sex" or "He was clearly up for sex", and being aware of boundaries to use in a Tribunal had hoped to myself that such description was appropriate and not too lewd. I stated we had sex in the cabin together. I did not detail what exactly we did, and our use of condoms etc, as was aware such detail would not be appropriate. I strongly believe however that I said at this point something like "He seemed motivated and fully taking part in our sexual activity."

Paragraph 88

My response to questioning was specifically that I and the Appellant ourselves went into a cabin and that we had sexual activity together.

Paragraph 89

My evidence is described from practical experience of the Appellant's sexuality shown to me in action at the sauna, as well as from observations of him and his partner elsewhere.

I request that notes to this case be re-examined.

[Mr] [W], 15 February 2019"

11. The appellant's representatives produced no record of the proceedings or even a summary.

12. I am grateful to both representatives for their careful submissions. Since their submissions were made without sight of the judge's record of proceedings, I have considered whether I should send it to the parties and give them an opportunity to comment on it before I reach my decision. In the end I have decided this is unnecessary since on any fair reading I consider several things are evident. First, in the Presenting Officer's note (and Miss Groves did not suggest that it should be taken to be anything other than accurate), there is no mention of anyone except Mr [W] and the appellant being present in the sauna area where he said he saw the appellant. Second, this Note is much more similar to Mr [W]'s account in his supplementary witness statement of what he said than that of the judge's record. Third, the Presenting Officer's Note is capable of being read as Mr [W] saying that the appellant was "up for sex" with him (i.e. with Mr [W]), and that this is what happened and that this why he expressed his hope that this would not upset the appellant's relationship with KS. Third, although the judge's record of proceedings makes no reference to Mr [W] himself having sex with the appellant, it does describe Mr [W] as going into the area with cabins and stating that it was "clear where he was and that he was having sex". It is difficult to construe those words as meaning only (as the judge opined) that Mr [W] "presumed" the appellant was having sex. Read together with Mr [W]'s supplementary statement, it cannot be excluded that the judge misunderstood Mr [W]'s evidence. According to Mr [W], he had not been clear and straightforward in his description of what happened because of "being aware of boundaries to use in a Tribunal" and there is an element of ambiguity in both the judge's record of proceedings and the Presenting Officer's Note.

In reaching this assessment, I have taken into account as a factor pointing the other way, that the judge did not record either of the representatives as proceeding on the basis that Mr [W] had said he had had sex with the appellant and that if they had understood his evidence as being to that effect it should have made a significant difference to their submissions. However, I have decided that it would be unsafe to place too much weight on this point. For one thing, it would appear from the judge's record that the submissions were taken up with other matters, in particular the issue of how the judge should approach the fact that the appellant's representatives had not produced a copy of the negative appeal determination in the case of KS. For another, as already mentioned, there is a distinct possibility that Mr [W] was not as clear as he said he thought he was because of concern not to overstep boundaries of decency. Given (i) that the judge said he accepted Mr [W] as a credible witness (despite reservations), (ii) that Mr [W] was clearly, on all accounts of his evidence, in the same gay sauna as the appellant and in close proximity to him; (iii) that KS was not there; (iv) that there was no questioning (as one might expect if the appellant was not alone and not with Mr [W]) as to who the other person in the sauna was or could have been, there is too great a risk that the judge misunderstood the purport of Mr [W]'s evidence. Since he only found Mr [W]'s evidence

to have limited weight because he had not seen the appellant having sex, it may have made a material difference if he had understood Mr [W] to be saying he had had sex with the appellant.

Two other factors that has influenced my decision are firstly that the judge's observation that "the evidence of a loving and lasting relationship is the most persuasive evidence" appears too judgemental; and secondly that t even on the evidence accepted by the judge it would appear that the appellant has spent over a year attending at places known to be locations where there are gay men. That meant that either he had spent a considerable amount of time and effort constructing a false gay profile or that he was gay. If, as seems to be the case, that the judge believed that the appellant had been constructing a false gay profile, then I would have expected some inquiry of Mr [W] and other witnesses as to whether they considered that if the appellant was feigning a gay sexual identity, they could detect that.

For the above reasons, I have concluded that the judge's decision is unsafe and that the case needs to be remitted for a fresh hearing.

Direction as to preparation for next hearing

Given that the evidence of Mr [W] will very likely play a significant part at the next hearing, **the appellant's representatives are directed to obtain a further supplementary statement from Mr [W] to be submitted to the Tribunal at least 21 days in advance of the hearing (with copy to the respondent), giving particulars of all the times he has attended as a witness in asylum appeals with details of the names of the appellants and the dates of the hearings, the names of the representatives and judges (if recalled) and the outcomes if known.**

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.

Signed H H Storey Date: 10 July 2019

Dr H H Storey
Judge of the Upper Tribunal