Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14149/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th February 2019	

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

M S R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan (Counsel)
For the Respondent: Ms S Cuhna (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Dean, promulgated on 19th July 2017, following a hearing at Taylor House on 10th July 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was

granted, permission to appeal to the Upper Tribunal and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 10th December 1980. He appealed against the decision of the Respondent dated 8th December 2016, refusing his claim for asylum and for humanitarian protection.

The Appellant's Claim

3. The Appellant's claim is that he is gay, and as a result of this, he fears persecution and serious harm in Bangladesh because of his sexuality. As the judge pointed out, his case is that he first became aware of his sexuality in 1995, but was also aware that homosexuality was considered a sin in Islam and he therefore kept these feelings to himself. The Appellant came to the UK in 2009 and subsequently observed public displays of affection between men. He started going to gay clubs in 2010. In February 2013 he met a man called "Anthony" with whom he had a seven to eight month relationship. The Appellant states that he lives openly in this country as a homosexual and as a non-practising Muslim (see paragraph 9 of the determination).

The Judges Findings

4. The judge observed how the Respondent had pointed out that the Appellant had been in the UK since 2009, and had only mentioned his sexuality in 2016. In fact, he did so only when he was in immigration detention after claiming asylum. His initial claim had always been that he was an atheist, and in a subsequent statement to a doctor, whilst in detention in 2016, he had stated that he was a homosexual. Moreover, his account was inconsistent because he had claimed to have been beaten by his father in 1995, or alternatively in 2009, but this was on the basis that he was an atheist, and not because he was a homosexual. Furthermore, with the exception of the evidence of "Masudur Rahman" all the letters of support were from people who were recent associates, and were post-decision letters.

5. The judge concluded that,

> "Looking at this evidence I find that although the Appellant clearly had contact with the Respondent by way of a number of applications for leave, as well as regularly reporting to the authorities, at no time did he mention his sexuality or even that he was in fear of returning to Bangladesh. Accordingly, while not determinative, I find that the Appellant's claim to be gay is undermined because of his failure to mention this fact when he made applications for further leave to remain in the United Kingdom" (paragraph 12).

6. The judge also went on to say that, even after the Appellant had made his asylum claim on 13th June 2016, he failed to mention the fact that he was gay, and this matter only arose after the completion of the Rule 24 report in Harmondsworth on 19th July 2016, when he told the doctor that he was a non-practising Muslim "and also a homosexual" (see paragraph 14). It was now his case that he claims "to have been leading a homosexual lifestyle in this country since 2010" (paragraph 14).

7. The judge went on to conclude that "looking at the evidence in the round" the Appellant could not be considered credible in his claim that he was gay.

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application are that the judge failed to engage with the evidence of an important witness, namely, a Mr Peter Bernard Blackburn, who gave corroborative and unchallenged evidence of the Appellant's homosexuality. Yet, the judge had already dismissed the Appellant's credibility before going on to consider this unchallenged evidence. Second, the judge did not record the fact that the Respondent chose not to pursue allegations of deception which had only be raised, on the basis that the Appellant had cheated in his ETS English language test results, and so this can in no way be seen as strengthening the case of the Respondent. Third, that the judge did not record and give proper weight to the oral as well as the written evidence of Mr Blackburn.

10. On 11th October 2017, permission to appeal was granted by the Tribunal on the basis that it was arguable that the judge (at paragraphs 25 and 26) had dismissed the Appellant's credibility first and only then considered the evidence of Mr Blackburn, and no consideration was given to the fact that this was unchallenged evidence.

11. On 4th January 2018, the Upper Tribunal stated that this case was not suitable for a panel hearing and was not one which should not go before the single judge in the normal manner.

Submissions

12. At the hearing before me on 11th February 2019, Mr Chelvan, appearing as Counsel on behalf of the Appellant, handed up his skeleton argument. He then made the following points. First, that, although it was the case that there had been a "Cart JR" which was determined by Lord Justice Irwin, in an order dated 23rd November 2018, the observation there by the Learned Judge could not be binding on this Tribunal. What the Right Honourable Lord Justice Irwin had stated was that the term "homosexual" is a perfectly proper and correct term, for which the term "gay" is normal as a synonym. The preference of the "applicant's representatives" for the word "gay" of the word "homosexual" is quite irrelevant, and should not have been

expressed. This was in relation to what had been said in the grounds of application (by Counsel, Jennifer Blair on 25th April 2018, at paragraphs 14 to 15), that "the judge has made stereotypical assumptions" in "assessing credibility in sexual orientation based claims for international protection" (paragraph 14). Mr Chelvan submitted that the use of the phrase "homosexual" was outdated and prone to be disparaging. Indeed, he drew strength from the submission from the fact that the "Equal Treatment Bench Book" (February 2018), makes it quite clear, under the heading "acceptable terminology" that, "In general the following terminology is considered acceptable: a gay man. The word 'homosexual' sounds old fashioned and it carries echoes of discriminatory attitudes and practices in the past" (see paragraph 47). Mr Chelvan submitted that the Equal Treatment Bench Book does not appear to have been drawn to the attention of the Court of Appeal when the argument was made. However, the fact that in the instant case, Judge Dean refers to how it is that the Appellant had told his doctor in Harmondsworth on 19th July 2016 that he was a non-practising Muslim "and also a homosexual" (see paragraph 14) suggested that there were echoes of the past discriminatory attitudes in the judge's treatment of this appeal. This was compounded by the fact that the judge refers to the Appellant claiming "to have been leading a homosexual lifestyle in this country since 2010" (paragraph 14). Mr Chelvan submitted that there was no such claim ever made by the Appellant. He had always referred to himself as a "gay" man. In any event, on the day of the hearing itself, he had attended presenting himself as a "gay" person and not as a homosexual.

13. Second, it was plainly an error of law for the judge not to have referred to the evidence of Peter Bernard Blackburn (whose witness statement appears at pages 91 to 92), particularly given that this evidence was unchallenged, and that he was not even cross-examined by Counsel on the day. What this witness does is to make it clear that, "I testify that as a gay man with more than 40 years on the gay scene, I believe that the Appellant's asylum application was genuine ...." He had gone on to say, "I also testify that he has been totally relaxed while we cuddled each other at the Eagle Club, a club that gay men attend" (paragraph 5). This witness goes on to say that,

> "The Immigration Judge questioned my evidence that it was not safe in Bangladesh from the evidence I had seen, e.g. news reports. This was part of my evidence that was questioned by the judge, simply to establish that I had no first-hand knowledge of Bangladesh, or any academic expertise on the subject. However, when it came to the barrister's submissions, the Home Office barrister dropped this part of the case, accepting that if the Appellant is gay, he would be entitled to protection" (paragraph 6).

14. No reference whatsoever, submitted Mr Chelvan, is made to this evidence. In particular, if it is indeed the case that this witness claims that he met the Appellant at the "Eagle Club" which was frequented by gay men, and

that he and the Appellant cuddled each other, this evidence could not have been left out of consideration.

15. Third, Mr Chelvan submitted that what the judge had on the contrary done, however, was to repeatedly refer to having looked at the evidence "in the round" before even considering the evidence of the witnesses, and then concluding that the Appellant was not credible in the account that he gave. This was putting the cart before the horse. The judge had already made his decision before he came to the evidence. This was indeed the precise basis upon which Judge Ford had granted permission to appeal.

16. For her part, Ms Cuhna submitted that she would place reliance upon the Rule 24 response which makes it quite clear that the Appellant's evidence is not credible. Furthermore, it is not true that the judge had neglected the evidence. He makes it quite clear that he considers the evidence of Mr Rahman (at paragraph 18) and then observes that there are "material inconsistencies" in the evidence. The judge had already reached his conclusions before turning to the evidence of Mr Masudur Rahman, whom the judge refers to "in his written evidence", before concluding that it was implausible that the Appellant would be open about his sexual orientation within a few days of meeting someone in a food shop, and who had identified himself as a Bengali Muslim because of his homosexuality, given that this was contrary to the teachings of Islam.

17. But most importantly, it was the judge's failure (at paragraph 26) to consider the evidence of Mr Blackburn on its own terms. This was the evidence on the day. It must not be forgotten that the current sexual identity on the day has to be looked at, as emphasised by the Court of Appeal in **NR (Jamaica) [2009] EWCA Civ 856**, and this was the position that was presenting itself on the day before the judge. The judge was wrong to avoid considering this. What the judge did do (at paragraph 26) was to reject this evidence on the basis that this evidence postdated the Appellant's release from immigration detention and could therefore not be of significance. The only issue before the Tribunal was whether the Appellant was gay. However, Mr Blackburn was not cross-examined. He was not even challenged. There was no issue of the ETS deception that had previously been raised a year ago. That being so, if this matter were to be remitted, it should not be remitted "de novo", because the only issue is that of the Appellant being a gay man and all other issues have fallen by the wayside.

18. For her part, Ms Cuhna submitted that the Rule 24 response did not concede the fact that the ETS deception was not any longer a live issue. Mr Chelvan returned to say that if one looks at the CIPU report of November 2017, under the heading of "assessment of risk" this makes it clear at paragraph 3.1.1 (at pages 9 to 10) that if a person is gay, then there is a risk on return because this would lead to Section 377 prosecutions in Bangladesh.

Error of Law

19. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are twofold. First, this is a case where the judge has, as the grant of permission makes clear by Judge Ford, made his findings of fact before looking at the evidence. The judge repeatedly refers to looking at the situation in the round, before his consideration of the evidence. For example, he states that "When taken in the round I find that the veracity of the Appellant's claim to be gay is undermined" (paragraph 13) because he had earlier claimed only to be an atheist from a Muslim country and not a gay person. I agree with Mr Chelvan, that if this were to be the case then the vast majority of gay claims would fail. One has to look at the situation as it presents itself on the day. The judge also states that "Looking at the evidence in the round, I find that the Appellant has failed to give a consistent account of the facts" (paragraph 18). It is only after this that the first reference is made to the evidence of Mr Masudur Rahman (at paragraph 24), who states that the Appellant had got to know him and then told him about his sexual orientation. The judge once again states that "When taken in the round it does not materially advance the Appellant's case".

20. Second, and even more importantly, the evidence of Mr Blackburn is not rejected on the basis of intelligible reasons given. In **SIO (sexual identification of a lesbian from Nigeria) [2017]**, the Upper Tribunal stated that,

> "The other witnesses gave a range of reasons to corroborate the Appellant's account of being a lesbian and it was necessary for that evidence to be evaluated and addressed. The judge may well have a good reason to not accept the sentence. He may, for example have thought that the evidence was largely based on what the witness had been told by the Appellant. ... However no such reasoning was given in the decision and the absence of reasons being given as to why each of the witnesses (other than the Appellant and S) were not believed, I agree that there has been an error of law. The error is material because the evidence of the numerous witnesses whose evidence was not addressed is relevant too, and potentially determinative of, the question of the Appellant's sexuality" (at paragraph 20).

21. In this case there was no evidence of numerous witnesses. There were two principle witnesses. Of these the evidence of Mr Blackburn was most significant. The judge rejects that evidence but gives no reasons for doing so. The conclusion reached thereafter that "the Appellant is a stranger to the truth" (paragraph 27) may well have been the right conclusion, but it could only have been reached after the evidence in its entirely had been taken into account, before it being rejected simply on the basis of there having been a delayed application by this Appellant whilst he was in detention.

22. Although Mr Chelvan has invited me to make a finding of an error of law and to remake the decision in this Tribunal, and if necessary to do so on the basis of hearing the evidence of Mr Blackburn, who was present in court, together with Mr Rahman, who was also present in court, I consider it much more expeditious that this matter should return back to the First-tier Tribunal, to be determined by a judge other than Judge Dean, so that the evidence can be taken in a fulsome manner and, if necessary, cross-examined by the Respondent Secretary of State. For the avoidance of doubt, I make it plain that this is a case where there is no ETS exception issue to consider. That was not the position before the judge. This history of this case makes this clear. The decision appealed against was dated 8th December 2016. It was based upon an alleged deception in the TOEIC deception dated 6th August 2014. That led to an adjournment of the hearing on 26th January 2017 so that the Respondent Secretary of State could make that allegation good. When evidence was submitted by the Respondent at the January 2017 hearing, this was then not even relied upon by the Tribunal on 10th July 2017. In short, the Respondent did not run the deception point at all. It has fallen by the wayside. The issue before Judge Dean was simply that of the Appellant being a gay person. That is the only issue to be determined. It has to be determined on the basis of the evidence of the two witnesses who attended the hearing to support the Appellant before any decision of finality can be made in relation to the Appellant's sexual orientation.

23. An anonymity direction is made.

24. This appeal is allowed.

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 Date

Deputy Upper Tribunal Judge Juss 13th March 2019