Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/06089/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House (by *Skype*)	**Decision & Reasons Promulgated**
On 21 October 2020	**On 27 October 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

DF (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Loughran, instructed by Islington Law Centre
For the Respondent: Ms S Cunha, Senior Presenting Officer

DECISION AND REASONS (V)

1. The appellant is an Albanian national who was born on 10 April 2001. He appeals, with permission granted by Upper Tribunal Judge Kamara, against a decision which was issued by Judge K L James ("the judge") on 20 January 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his claim for international protection.

2. The appellant's protection claim has two limbs. He claims, firstly, that he is a gay man who has been subjected to violence and insults for much of his life as a result of his sexual orientation, and he fears similar treatment

on return to Albania. Secondly, he claims that he became involved in an Albanian drugs gang when he was a teenager and worked for some time in a cannabis factory in that country. He also fears retribution from the gang in the event that he returns. It was accepted by the Competent Authority, on conclusive grounds, that the appellant was a victim of trafficking. For her part, the respondent also accepted that aspect of his claim. She did not accept his claim to be a gay man, however. She refused his application for international protection for that reason, and because she considered that he could avail himself of a sufficiency of protection from the Albanian state.

3. I pause here to note that the refusal letter in this case, which was sent to an accepted victim of modern slavery shortly after his eighteenth birthday, is the longest refusal letter I have seen in the two decades that I have been in immigration law. It comprises 59 pages of single-spaced type. Whilst it is entirely understandable that the respondent will wish to set out with some clarity the basis upon which she refuses a claim as important as a claim for international protection, it must be recalled that a refusal letter is addressed to an applicant and is to be understood by that individual. It does not assist that individual, nor does it assist a judge on appeal, if the respondent is unable to express her conclusions with greater concision.

The Appeal to the First-tier Tribunal

4. The appellant appealed, and his appeal came before the judge on 29 November 2019. The appellant was represented by Ms Loughran of counsel, as he was before me; the respondent was represented by a Presenting Officer. There was a bundle from the respondent which comprised the refusal letter, the asylum interview and the appellant's initial statement (dated 8 November 2017), amongst other documents. There was a lengthy bundle from the appellant's solicitors, containing expert reports from a Mr Tahiraj and Ms Beddoe and a detailed witness statement (of 34 pages), amongst other documents.

5. The judge heard oral evidence from the appellant and submissions from Mr Wilcox and Ms Loughran before reserving her decision. In her decision, the judge stated that the appellant had 'failed to give persuasive oral evidence on basic issues regarding his claimed sexuality': [27]. Over the course of the following three pages of her decision, the judge set out a series of reasons in support of that conclusion. The reasons may be summarised as follows.

6. Firstly, the judge was concerned by the absence of any witnesses or documentary evidence to support the appellant's claim to be a gay man. Secondly, she considered his claims to be living an openly gay life in London to be contradicted by his inability to name any of the bars he had visited or the people he had met. Thirdly, the judge considered the appellant's account of practising mannerisms in front of his bathroom mirror and of watching 'gay stuff' on his phone to lack detail, for example of the names of gay dating apps. Fourthly, the judge considered it to be 'a

concern' that the appellant had not been in touch with D, the young man with whom he claimed to have enjoyed a relationship in Albania. The judge concluded that the appellant's account was vague, improbable and that he had failed to submit satisfactory evidence to establish even to the lower standard that he was a gay man. In the alternative, the judge accepted the contention in the refusal letter that the appellant could find support in Albania and that there would be a sufficiency of protection and an option of internal relocation upon return. The judge did not accept that the appellant would be at risk on return as a victim of trafficking and she also dismissed his appeal on ECHR grounds.

The Appeal to the Upper Tribunal

7. In grounds of appeal which were settled by Ms Loughran on 31 January 2020, it was submitted that the judge had erred in law in four respects. Ground one is that the judge failed to have regard to the expert evidence of Dr Tahiraj and Ms Beddoe. Ground two is that the judge failed to consider the appellant's appeal statement of 19 November 2019 at all. Ground three is that the judge's reasons for finding the account to be untrue were unlawful, for requiring corroboration and for re-characterising the appellant's behaviour according to her own perceptions of 'reasonability'. Ground four is that the judge failed to make any findings on a separate contention which had been advanced before her, which was that the Article 8 ECHR claim should succeed because the appellant was a recognised victim of trafficking.

8. Judge Kamara granted permission on each of these grounds, noting that it was particularly arguable that the judge had failed to engage with the expert evidence or the contents of the 34 page witness statement which had been prepared for the appeal.

9. The respondent filed a response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In that response, which was settled by Mr Melvin (Senior Presenting Officer) the respondent submitted that the judge's decision had been open to her on the evidence presented; that she was not required to set out the witness statement 'in any great detail'; that the conclusions as to credibility were sustainable; and that it did not follow from the conclusion that the appellant had been trafficked that the appeal should be allowed on Article 8 ECHR grounds. The respondent invited the Upper Tribunal to dismiss the appeal.

10. At the outset of the hearing, I asked Mr Cunha for her submissions on ground two, which I considered to be Ms Loughran's strongest point. Ms Cunha had noted that the judge had made no reference to the appellant's witness statement and she acknowledged that it might have been better if there had been some consideration of that document. In defence of the stance taken in the rule 24 response, however, she submitted that the judge had based her findings on oral testimony, which was 'stronger evidence' than the witness statement. It had been open to the judge to find as she had.

11. I indicated to Ms Loughran that I did not need to hear from her on her grounds of appeal, and that the appeal would be allowed. I asked her what relief she sought. In light of the nature of the error into which the FtT had fallen and the scope of the fact-finding exercise which would be necessary, Ms Loughran submitted that the proper course was for the appeal to be remitted to the FtT for re-hearing de novo before a judge other than Judge K L James. Ms Cunha did not oppose that course, and I indicated that it would be the outcome of the appeal. My reasons for reaching that conclusion are as follows.

Analysis

12. At [31]-[36] of the refusal letter, the respondent gave a number of reasons for concluding that the appellant's account was 'vague, lacking in detail, internally inconsistent' and that he had 'failed to show any personal connection to [his] emotions'. The latter comments appear to be based upon an assumption, commonly encountered in letters of refusal, that every individual who realises that they are gay will not only go through an 'emotional journey' of discovery but also that they will have the ability to describe that journey in an asylum interview. For those like the appellant who come from a society in which any such 'journey' is likely to be repressed and never discussed, and in which the very process of talking about one's emotions and sexual orientation (or experiences) is frowned upon, I do not consider that to be a safe assumption. Although a student from California might well be able to explain quite cogently the journey of discovering and coming to terms with their own sexual orientation, the emotional and linguistic skills to do so may not have been learned by a person from a culture such as the appellant's.

13. Thankfully, however, the experienced judge in the FtT based none of her findings on the appellant's inability to explain his 'personal connection' to his emotions. The central plank of her reasoning was instead that the appellant's account was not supported by evidence which she thought should be readily available from within the UK. She was surprised that there were no other gay men who could attest to the appellant's lifestyle in this country. She was surprised that the appellant had not produced any evidence that he had been to gay venues, and was unable to name any of these venues. And she was surprised that he had made no attempt to be in touch with D, with whom he had been in a relationship in Albania for some time. She thought it unlikely that he would be unable to name a single gay dating app. The judge expressed these concerns after considering the appellant's interview transcript and his first witness statement (of 8 November 2017) at length. Paragraph [25] of her decision, which spans essentially a whole page, contains a detailed analysis of what was said in the interview. And at [26] there is a detailed summary of the first witness statement. At no point in the decision, however, does the judge make any reference to the appellant's detailed statement which was prepared specifically for the purpose of the appeal.

14. As Ms Loughran notes in her concise and precise grounds of appeal, the witness statement bore directly upon some of the judge's concerns. Insofar as she found that the appellant had 'chosen not to be in contact with [D]', for example, that was not the account put forward by the appellant. He said in his statement that he had tried to contact D, including by sending him messages through Facebook, but that D had blocked the appellant on his phone and had not responded to online messages.

15. The judge was also concerned about the fact that the appellant had not called to give evidence a man with whom he had had a relationship in the UK. But the appellant had detailed this relationship in his statement, saying that it had not been close and that he feared he had merely been used for sex by the other man.

16. The appeal statement also shed light on what had gone before it. The appellant sought to make amendments to the statement he had made on 8 November 2017, for instance, and said that he was not sure whether that document had ever been read back to him. He said that he had not been feeling well on the day of the substantive asylum interview and made comments on the answers he had given. And he had provided a detailed response to the points taken against him in the refusal letter. Despite her detailed references to the interview, the November 2017 statement and the refusal letter, the judge made no reference whatsoever to the appeal statement or to the way in which it addressed the contents of those earlier documents.

17. It is clear that the judge had many reasons for finding the appellant's account of his sexual orientation to be untrue. Many of those reasons were soundly based, in my judgment, but the error identified by ground two is fundamental and is such that the judge's assessment of credibility cannot stand. The appellant adopted his witness statement as his examination in chief and it fell to be considered by the judge. It was plainly material to a number of the judge's concerns and her conclusions as to his credibility are unsafe because she failed to take the statement into account.

18. This is not a case in which the decision can properly be upheld on the basis of the judge's findings in the alternative. She concluded, as I have recorded above, that the appellant could relocate internally and that he could avail himself of a sufficiency of protection from the Albanian state. As suggested in the first of Ms Loughran's grounds, however, those conclusions were reached without any engagement with the expert evidence provided by Ms Beddoe and Dr Tahiraj. Both of those reports bore directly on these questions. At [31], the judge found for the respondent on these issues. In doing so, she 'adopted' what had been said in the refusal letter "even taking into account the background and expert evidence adduced by the appellant". I do not consider these reasons to represent a legally adequate resolution of these critical issues. The expert evidence advanced detailed reasons for reaching the opposite

conclusion to the refusal letter and it did not suffice for the judge merely to state that she had taken it into account. If she was to reject the conclusions in the expert evidence, her obligations were to approach that evidence with appropriate care and to give good reasons for reaching a contrary conclusion: SS (Sri Lanka) v SSHD [2012] EWCA Civ 155. I do not consider the judge's reasons to have complied with either limb of that requirement.

19. It follows that the first two grounds are made out and that the decision must be set aside as a whole. Ms Loughran did not seek to address me on the remaining grounds in those circumstances and it is not necessary for me to express any view upon those grounds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law and that decision is set aside as a whole. The appeal is remitted to the FtT for rehearing de novo before a judge other than Judge K L James.

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 his 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. I make this direction because it reduces the risk to the appellant if his claim is ultimately unsuccessful and he is returned to his country of origin.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 October 2020