



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: PA/10735/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 25 June 2021

On 7 July 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

HB

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr P Lewis of Counsel, instructed by Duncan Lewis & Co

For the Respondent: Ms A Everett, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Botswana with date of birth given as 24.5.92, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 29.9.20 (Judge A Davies), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 7.8.19, to refuse his claim for international protection on the basis of sexual orientation and being a member of a particular social group (PSG) as a homosexual man at risk on return to Botswana.
2. Permission to appeal was granted by the First-tier Tribunal on 26.10.20, the judge considering it arguable that the judge erred in law by looking at passages of source material other than those cited in the expert report and in failing to provide the appellant and his representative notice of the new matters under consideration, thereby amounting to procedural unfairness. However, there were a number of other grounds in the application for permission to appeal.
3. I have carefully considered the decision of the First-tier Tribunal in the light of the written and oral submissions.
4. The Upper Tribunal has received the respondent's Rule 24 response, dated 2.11.20. Very late, by email received on 23.6.21, the Upper Tribunal now has the appellant's skeleton argument dated 23.6.21, together with a bundle of materials including the witness statement of Ms A Faryl of Counsel. However, there has been no Rule 15(2A) application.
5. As I explained to the parties at the outset of the hearing, I do not have a copy of the notice and grounds of application for permission to appeal. The notice within the file relates to a different case entirely (EA/06684/2019). However, from according to the appellant's skeleton argument, grounds 2 and 3 submit that there was procedural unfairness in that the Home Office Presenting Officer indicated at a CMR that they did not wish to cross-examine the appellant as there was no issue as to his credibility, as a result of which the appellant was not called to give evidence. It is argued that the respondent effectively conceded that the appellant's factual account was credible in its entirety, including his assertion that he did not conduct his relationship with TB openly in Botswana.
6. There was no record of the CMR in the Tribunal's case file. Ms Faryl's statement suggest that it took place on 14.9.20, which cannot be correct as that was the date of the substantive appeal hearing. However, Mr Lewis identified the correct date as 13.7.20, which Ms Everett was able to confirm from Home Office records. She also read out the minute which included the Presenting Officer's suggestion at the CMR that given the respondent's acceptance of the appellant's sexual orientation there were very few issues, proposing that the appeal could proceed by way of submissions only. Ms Faryl's recollection was that the Presenting

Officer stated that he did not wish to cross-examine the appellant as his credibility was not in issue. The Home Office minute indicates that the judge agreed to this course of action. In consequence, the appellant was not called to give oral evidence at the First-tier Tribunal appeal hearing.

7. The significance to the grounds of appeal is as follows.
8. The previous First-tier Tribunal appeal before Judge Amin in 2014 stated at [45] that the appellant's relationship with TB was "to some extent conducted openly when the appellant and (TB) met in public houses." At [28] of the instant decision, the judge recorded this finding. However, the appellant's witness statement from January 2020 stated at [9] of that document that, "I understand that the previous Tribunal thought that I had conducted some of my previous relationship in the open but that is not correct. I believe that was a misunderstanding of my evidence that I gave in my interview and I refer to the notes of that interview." The judge correctly noted this challenge to Judge Amin's finding at [39] of the decision, "The appellant stated that the previous Tribunal had incorrectly reached the conclusion that he had conducted some of his previous relationship in the open." Nevertheless, at [40] the judge went on to note that this disagreement with the previous Tribunal findings was not supported by fresh evidence or evidence not available in 2014. "For example, the appellant did not in his witness statement provide any detail about the extent to which the relationship with (TB) was conducted in public and the extent to which it was conducted in private. There is nothing in his witness statement to make it appropriate to depart from Judge Amin's conclusion that part of the appellant's relationship was conducted (publicly) such as visiting pubs."
9. It follows from the above and the rest of the decision that the First-tier Tribunal Judge relied on the relationship having been conducted at least in part openly in the assessment as to whether to depart from Judge Amin's findings and more generally in determining the overall risk of persecution on return. However, the appellant had maintained in his witness statement that Judge Amin got it wrong and given that the Home Office did not challenge the appellant's credibility, the First-tier Tribunal Judge was not entitled to go behind that concession, which by implication includes his assertion that he did not conduct his relationship with TB publicly. As the Upper Tribunal stated in *Kalidas* (agreed facts – best practice) [2012] UKUT 00327 (IAC), "35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary."

10. It is submitted that had the appellant and his representative been aware that the judge intended to go behind the concession, they would have considered calling the appellant to give oral evidence. They were deprived of the opportunity to consider this and to make submissions on the point at the First-tier Tribunal, which would likely have steered the judge away from making this error of law.
11. Following discussion with the two representatives as to this sole ground of appeal, Ms Everett very fairly conceded that she could not defend the decision of the First-tier Tribunal and accepted that a material error of law had been identified.
12. I entirely agree with the submissions contained in the grounds on this point and, notwithstanding the absence of some documentation and indeed a copy of the grounds as originally drafted, I am satisfied that this amounted to such a material error of law that the decision cannot stand but must be set aside. Mr Lewis concurred with my suggestion that in the circumstances of this finding, there was no purpose in canvassing the other alleged errors of law set out in the grounds and skeleton argument. For that reason I have not addressed the other grounds at all.
13. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal as to require it to be set aside to be remade afresh, with no findings preserved.
14. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The error of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
15. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The making of the decision in the appeal is remitted to the First-tier Tribunal sitting at Manchester to be remade de novo.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 25 June 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 25 June 2021