IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002693
First-tier Tribunal No:
PA/51627/2020
IA/00284/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

RA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Reza, JKR Solicitors
For the Respondent: Ms. A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 21 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge J K Swaney, (the "Judge"), promulgated on 19 May 2023, in which she dismissed the Appellant's appeal against the Respondent's decision to refuse his protection claim. The Appellant is a national of Bangladesh who claimed asylum on the basis of his sexuality.

2. Permission to appeal was granted by First-tier Tribunal Judge Hatton in a decision dated 18 July 2023 as follows:

> "The grounds primarily assert the Judge erred in finding at [52 & 62] that the Appellant is not a gay man as claimed. I accept the grounds' overriding contention that this finding is arguably at odds with the Judge's acceptance at [33] that the Appellant had same-sex sexual intercourse with his 1st witness ([Mr H]). Correspondingly, it is unclear from the Judge's decision on what basis the Appellant would not be considered as a gay man, having engaged in such activity. I further consider the Judge arguably erred in subsequently attaching little weight to the 2nd witness' ([Ms K]) evidence [37] for the cumulative reasons advanced in the grounds [4], expressly including the witness having observed the Appellant interact with other gay men at meetings, events, and saunas. In view of the Judge's preceding observation at [31] that both witnesses have given evidence in "multiple appeals" [31], it is arguable they were well-placed to provide pertinent and accurate observations about perceived members of the LGBT community, and correspondingly, that greater weight should have been accorded to their combined testimony. By the same token, I accept it is arguable that the Judge's refusal to accept the Appellant is a gay man may in turn have infected associated conclusions pertaining to the Appellant's other supporting evidence and his delay in claiming asylum."

The hearing

3. There was no Rule 24 response in the bundle. At the hearing, Ms. Nolan provided a copy of a response dated 15 August 2023 in which the Respondent agreed that there was merit in the grounds. The Rule 24 states as follows:

> "2. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant is a gay man and whether he will be at risk of persecution or will have to modify his behaviour to avoid persecution in Bangladesh.
>
> 3. The finding at paragraph 33 that the appellant had sex with another man on one occasion does not sit well with his conclusions.
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> 4. The judge also appears to accept by implication that the witness, [Ms K] witnessed the appellant in gay saunas and other venues."

4. Given this concession by the Respondent, I set aside the Judge's decision and remitted the appeal to be decided afresh in the First-Tier Tribunal.

Error of law

5. The grounds assert that the Judge gave limited weight to the evidence of Ms. K, finding that she had limited bases for her conclusions that the Appellant was gay. The grounds assert that Ms. K had provided reasons for her belief including that she had known the Appellant for five years, had observed him attending "Apanjon" meetings and events, had observed him interacting with other gay

people, had learned from Mr. H, who also gave evidence, that they had had sex, had learned from other "Apanjon" members who had seen the Appellant getting intimate with other gay men, and lastly had herself seen the Appellant in gay saunas.:

6. When considering Ms. K's evidence, the Judge states at [34] and [35]:

> "[Ms K], who is the chairperson of Aponojn, states that she had a one to one meeting with the appellant, on the basis of which she decided that he was gay and permitted him to join Aponjon. While she states that she believes that she only permits people who she believes are committed to its cause to join Aponjon, she acknowledged in her oral evidence that if someone claims that they are gay 'we respect what they say, but don't know what is inside them'. [Ms K] was also very clear that prospective members are told that they must attend meetings regularly before Aponjon will agree to support them. It is perhaps unsurprising therefore that the appellant is stated to have attended meetings regularly.
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> When asked if she thought the appellant was pretending to be a member of the community [Ms K] said that she did not believe so. She said that she had seen him in gay saunas and in rooms where intimate sessions take place. She merely referred to the appellant's presence, not what she had observed him doing. Of course I did not expect, nor would I have heard evidence of sexual activity, but there was no indication that the appellant was anything other than simply present."

7. I find that the Judge has failed to give adequate reasons for why, given that she appeared to accept the evidence of Ms. K, and did not find her to be an unreliable witness, she has not given weight to her evidence.

8. I find that this failure in relation to her treatment of Ms. K's evidence is compounded by the fact that the Judge accepted the evidence of Mr. H that he had had sex with the Appellant. When considering the evidence of Mr. H, the Judge states at [32] and [33]:

> "[Mr H] claims to have had sex with the appellant on one occasion and to have maintained a friendship with him since then. He said that he and the appellant see each other approximately once a month in Whitechapel. He did not give any information about the nature of their contact, whether for example it is just in the context of attending Aponjon meetings or whether he and the appellant arrange to meet each other as friends. He states in his witness statement that he has seen the appellant at various gay venues and that he has observed the appellant being intimate with other men. He describes the appellant as openly gay.
>
> I am prepared to accept that the appellant and Mr Hossain have had sex on one occasion. This carries some weight, but must be viewed in light of all of the evidence."

9. While the Judge says that she must view this in the light of all of the evidence, I have found above that she failed to give adequate reasons for why she did not accept the other witness evidence. Further, given that she has accepted the evidence that the Appellant had had sex with Mr. H, she has failed to give

adequate reasons for her subsequent finding that he was neither gay nor bisexual.

10. I find that the decision involves the making of a material error of law. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
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> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."*

11. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). Given that the basis of the Appellant's claim is that he was gay, and that there are no findings that can be preserved on this core issue, I find that is appropriate in these circumstances for the appeal to be remitted to the First-tier Tribunal to be reheard.

Notice of Decision

12. The decision of the First-tier Tribunal involves the making of a material error of law.

13. I set the decision aside. No findings are preserved.

14. The appeal is remitted to the First-tier Tribunal to be reheard de novo.

15. The appeal is not to be listed before Judge Swaney.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 October 2023