Upper Tribunal
Immigration and Asylum Chamber

Appeal Number:
DA/00075/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2013

Promulgated on:
On 13 August 2013

Before

Upper Tribunal Judge Kekić

Between

Mr Alexey Vylegzhanin
(anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Mr R Jesuram, Counsel
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to the appellant on 25 June 2013 by Designated First-tier Tribunal Judge Bowen against the determination of First-tier Tribunal Judge S Taylor sitting on a

panel with Mr F T Jameson. No anonymity order was granted to the appellant by the First-tier Tribunal and none was requested of the Upper Tribunal. The determination of the First-tier Tribunal was promulgated on 7 May 2013.

2. The appellant is a citizen of Russia born on 31 January 1980. He appeals against a decision to refuse to revoke a deportation order against him under section 32(5) of the UK Borders Act 2007. There was no appeal against the earlier deportation order made on 18 September 2012 following the appellant's conviction on 19 January 2012 for conspiring to defraud (by cloning details from credit cards) and knowingly possessing a false and improperly obtained identity document (a false Lithuanian passport). A two year sentence was delivered on 4 May 2012). His application for revocation was made on 3 December 2012 but was refused on 7 January 2013. He has now completed his sentence (it is not when known precisely) and is being held under immigration powers.

3. The application for revocation is made on the basis of an asylum claim. The appellant maintains he is gay and would therefore be at risk from non state actors if returned to Russia.

Error of law Hearing

4. At the hearing on 5 August I heard submissions from Mr Jesurum and Mr Avery. Mr Jesurum expanded his grounds of appeal. He submitted that the panel had erred in refusing an adjournment to obtain a second expert report the first not having properly addressed the issue of sufficiency of protection. This report had since been received and was favourable to the appellant. The previous failings of the expert should not be held against the appellant and the Tribunal misdirected itself in refusing the adjournment and then dismissing the appeal because of a lack of documentary evidence on the very matter another report would have addressed. The report now available confirmed that the appellant would be at risk because he was openly gay and because the police would be unwilling to help.

5. It was further argued that the approach of the Tribunal on credibility issues was flawed, the Tribunal having taken section 8 matters as a primary consideration. There was no reference to IT Cameroon principles and there had been a failure to consider the appellant's explanation for the delayed asylum claim. There were also problems in that the appellant did not recall when he had signed the voluntary return form and Counsel had not had sight of it at all. As such, the panel should not have used a failure

to recall a date to make adverse credibility findings. There was also no attempt to analyse the appellant's account against the background evidence.

6. Finally, it was argued that the wrong test had been applied. It had been accepted that the appellant was openly gay and there was no challenge to his intention to live openly on return. That being the case, the panel had been wrong to consider whether he would be able to form gay relationships or lead a gay lifestyle. It should have considered whether he would be at risk as a result of doing so. There had been a failure to consider HJ Iran. For these reasons, Mr Jesurum submitted the determination needed to be set aside and the matter remitted for rehearing.

7. In response, Mr Avery submitted there had been no error of law. The panel had been entitled to refuse the adjournment. The expert had been informed of the issues. He was experienced in these matters and had prepared many reports in the past. There was no obligation on the part of the Tribunal to adjourn simply because Counsel had not been happy with the contents of the report. On the issue of credibility, it should be borne in mind that the appellant was convicted of fraud and this impacted on his reliability as a witness. His explanation did not satisfactorily explain the seven year delay in his claim. The panel was not satisfied with his evidence and was entitled to reach the adverse findings it did. The last ground was hampered by the lack of the second expert report. However, the determination indicated that the HJ test had been applied. The panel found that the appellant would only be subjected to discrimination. There was no fundamental error and the determination should stand.

8. Mr Jesurum replied. He stated that in respect to the adjournment application, the shortcomings of the expert should not reflect on the appellant. The report did not address the issue and that was why an adjournment had been sought. By refusing the application the Tribunal had deprived itself of the opportunity to receive evidence crucial to the issue at hand. Additionally, credibility was not assessed in the round and the wrong test was applied to accepted facts. His dishonesty had no bearing on the assessment of what would happen to him in the light of accepted facts. The determination should be set aside as it was unsustainable and the matter should be remitted for re-hearing as findings of fact would be required following the second expert report and new developments in Russian law.

9. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

10. I have carefully considered the determination, the submissions made, the grounds for permission and the other evidence before me. The addendum report from the expert was not before the Upper Tribunal or the Presenting Officer and no confirmation that it had been served was adduced. If an error of law is found then of course it may be served and shall be considered.

11. The first ground attacks the Tribunal's refusal to adjourn the appeal so as to obtain a second report from the same expert whose initial report was before the panel. It is misleading to suggest, as is maintained in the grounds, that the Tribunal approached the adjournment application from the point of view of its timing. The application is dealt with at paragraph 6. The consideration of the timing of the application does not feature in the judge's reasoning until towards the end of the paragraph. There is nothing in the reasoning to indicate that this formed the basis for the refusal. Read as a whole, it is plain that the Tribunal noted that a report had already been obtained, that the issue of sufficiency of protection had been put to the expert, that he *had* addressed this over a whole page (at paragraph 2.5.1) and that there was nothing to suggest he would be able to add anything further or produce a report which met with Counsel's satisfaction. This was not a scenario where an expert had omitted to deal with an issue put to him (when it could be argued that his failing might have disadvantaged an appellant); it was a situation where the appellant's representative was not satisfied with the contents of the report and wanted something else. In the absence of any indication that more could or would be forthcoming and the fact that the expert had already dealt with the issue put to him, I do not find that the Tribunal erred in deciding to proceed with the hearing.

12. The next complaint relates to the adverse credibility findings made in respect of the appellant. It is argued that the Tribunal reached a negative finding at paragraph 22 having considered the appellant's period of overstaying and his seven year delay in making an asylum claim only after he had decided to return home and well after the deportation order had been made. Much is made of the fact that the Tribunal placed weight on the appellant's inability to recall when he signed the disclaimer even though he had not been shown a copy and his representative did not have sight of it. It is plain from the determination that the precise date of

signing it is neither here nor there; what was important was that the appellant admitted in oral evidence that he had decided to return home (at paragraph 24) and that it was only after speaking to his brother that he changed his mind. Having sight of the form would have made no difference to that. His admission also undermines the submission made that the appellant had not realised what he was signing. The Tribunal was entitled to place weight on the fact that the appellant had made a decision to return.

13. I am, however, troubled by the judge's approach to credibility. It is the case that the appellant's sexuality was not disputed by the respondent and that the appeal was determined on that basis however as submitted by Mr Jesurum, the judge commenced his credibility assessment by considering the appellant's past immigration history, criminal conduct and timing of the application and before even coming on to his alleged experiences in Russia, found that section 8 factors had damaged his credibility (at paragraph 22). Of course these are matters which are very relevant to the credibility assessment and may point to a finding that the appellant had come here for economic and criminal reasons rather than to seek protection but they must be taken along with the other evidence and a conclusion should only be reached when all matters have been considered. It may be that the judge had all the evidence in mind and had just set out his findings in an unfortunate manner but I cannot speculate on that. What is plain is that an adverse finding had been made before the account of the appellant's experiences in Russia was considered. At paragraph 24 the judge states: *"While the Tribunal accepts that the appellant may have been assaulted on at least one occasion, the Tribunal has found that the appellant is an unreliable witness and less than credible"*. This plainly demonstrates that the judge's negative view of the appellant impacted upon the rest of the findings he made. However undesirable and distasteful the appellant's conduct has been justice requires the evidence to be assessed fairly and in the round. I do not consider this has been done here.

14. I would add, however, that contrary to what is argued in the grounds, the appellant's explanation for his late claim was considered but the judge did not accept that he would not have known he could have claimed asylum. Additionally, the absence of any reference to JT Cameroon would not invalidate a judge's findings if the principles were properly applied. Judges are not required to cite case law for every applicable principle.

15. It was also argued that the HJ (Iran) test had not been properly applied. It is unclear from paragraphs 24-25 whether the judge had the guidance of

HJ in mind. Moreover, his findings on whether or not the appellant had been assaulted are somewhat contradictory. On the one hand he finds that the appellant "may have been" assaulted at least once, he later rejects the account of assaults. Given that his findings on what is said to have occurred in Russia are in any event flawed, there are no sustainable findings on what would be likely to happen to the appellant as an openly gay man living an openly gay lifestyle.

16. Despite the fact that I find there were no errors in the judge's refusal to adjourn the appeal or in his approach to the disclaimer, I am of the view that there are serious difficulties with his credibility assessment and findings of risk on return. For these reasons I have decided to set aside the determination in its entirety. It only stands as a record of the proceedings. The appeal is to be transferred to the First-tier Tribunal for re-hearing afresh.

Decision

17. The First-tier Tribunal made errors of law which require the determination to be set aside. The appeal is allowed and remitted for re-hearing to the First-tier Tribunal.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

9 August 2013