



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/00043/2015

THE IMMIGRATION ACTS

**Heard at Liverpool
On 23 August 2017**

**Decision & Reasons
Promulgated
On 22 September 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**MD
ANONYMITY DIRECTION MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Mason, Counsel

For the respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This

prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because this decision refers to his asylum claim.

Summary of asylum claim and immigration history

2. The appellant is a citizen of the Tanzania and claims that he is at risk of persecution because he is gay.
3. The appellant entered the United Kingdom in 1999 as a student. The appellant therefore has a lengthy immigration history, which it is only necessary to summarise in this decision.
4. The appellant's leave to remain as a student came to an end in 2001 and he remained without leave. In 2008 he entered an Islamic marriage and lived with his wife and her son, J. J's father died in Burundi and it is claimed viewed the appellant as his father. By 2012 the appellant separated from his wife, when he claims she found out that he was also involved in a gay relationship.
5. The appellant then unsuccessfully applied to remain on the basis of family life with a girlfriend in 2013. The First-tier Tribunal dismissed an appeal on this basis on Article 8 grounds in a decision dated 10 November 2013.
6. On 9 May 2014, the appellant made an unsuccessful application to remain based on his relationship with J.
7. Whilst in detention on 11 October 2014 the appellant made a further asylum claim based upon his claim to be gay. That application was refused in a decision dated 19 December 2014. At the appeal hearing before the First-tier Tribunal on 10 February 2017, that is the subject of challenge in these proceedings, the appellant relied upon a very detailed witness statement dated 9 February 2017 ('the 2017 statement'). This includes a detailed account of the history of his claimed relationships and the struggles along his journey to eventually 'coming out' as a gay man. It is only necessary to summarise that account below.
 - (i) He was very slow to admit to himself that he was gay and struggled with his sexual identity partly because of his upbringing in Tanzania where homosexuality is illegal and pressure from his family.
 - (ii) Notwithstanding this he traced a long history of clandestine gay relationships starting from when he was a teenager in Tanzania.
 - (iii) Although the appellant continued having gay relationships in the UK he did not admit this to his sister and mother, for fear

- of being disowned.
- (iv) The appellant got together with his ex-wife in 2006 and married her in 2008 partly to please his mother who wanted him to get married and start a family. When they separated in 2012 his sister and mother once again placed pressure on him to start a new relationship and he got together with the girlfriend referred to above. The appellant continued having gay relationships during his relationships with these two women.
 - (v) The appellant then began a relationship with one of his sister's gay friends called Paul in 2012 but she did not know about the relationship although she may have had suspicions about the appellant's sexuality.
 - (vi) The appellant was detained in 2014 but released in 2015 when he was dispersed to Liverpool. In 2016 he met a group that helped LGBTI asylum seekers in Manchester and 'came out' on Facebook in April 2016. He was referred for counselling with the LGBT Foundation by Mr Braunston in November 2016 and receives support from a Church that is supportive of his sexual identity.
 - (vii) His family refused to have contact with him after he came out.

Procedural history

8. The appellant appealed against the respondent's decision dated 19 December 2014 refusing his asylum claim. That appeal took place at an oral hearing before the First-tier Tribunal on 10 February 2017. After a period of some 3 months less a day, the First-tier Tribunal Judge signed the decision, which was then promulgated the same day. The First-tier Tribunal dismissed the appeal, having found the appellant's claim to be gay to not be credible.
9. In a decision dated 5 June 2017 Designated First-tier Tribunal Judge Campbell granted permission to appeal observing that it is arguable that the First-tier Tribunal was mistaken regarding the basis of a previous application made by the appellant. Judge Campbell observed that the materiality of any error "*will be a matter for the UTJ deciding the issue. The decision is thorough and has the characteristic forensic precision of the very experienced judge who prepared it.*"
10. The respondent relied upon a rule 24 notice dated 3 April 2017 in which it was submitted that the First-tier Tribunal's findings were open to it. This argued that the First-tier Tribunal gave cogent reasons for disbelieving the appellant which went beyond any claimed misunderstanding of the factual background.

Hearing

11. Ms Mason relied upon and amplified the grounds of appeal. She submitted that the First-tier Tribunal made two factual errors, which played a material role in the factual findings, such that there had been unfairness. Ms Mason also argued that the First-tier Tribunal failed to take into account relevant evidence and failed to assess the appellant's claim to be gay in light of the evidence rehearsing the cultural, familial and religious barriers he faced before 'coming out'.
12. Mr Bates relied upon the rule 24 notice and submitted that any factual errors are not material because of the other adverse credibility findings. I refer to the submissions in more detail below.
13. At the end of the hearing I reserved my decision, which I now provide with reasons.

Error of law discussion

14. Ms Mason accepted that the period of nearly three months delay in signing the decision does not in itself give rise to a material error of law but that it must be considered as a relevant factor alongside the other grounds of appeal, which she submitted supported the proposition that the necessary degree of anxious scrutiny to all the evidence was missing.

(1) Mistakes of fact

15. The appellant has drawn my attention to two mistakes of fact. Mr Bates did not dispute these factual mistakes per se.
16. First, the First-tier Tribunal recorded on two occasions [8 and 72] that the appellant submitted an application dated 9 May 2014 to remain on the basis of a marriage, that had ceased to be a marriage, and commented that there was no adequate explanation for this. There was no need for such an explanation because it is clear from the papers in the respondent's bundle that the application was not based upon the partnership route but on his parental relationship with J. That the relevant application (which was not in the papers before me or the First-tier Tribunal) was based upon his claimed parental relationship, is clear from the following evidence before the First-tier Tribunal:
 - (i) The application was accompanied by a parental agreement dated 26 March 2014 between the appellant and his ex-wife (who were living at separate addresses).
 - (ii) The notice of decision refusing the application dated 4 July 2014 only addresses the claim to remain under the 'parent route' and on the basis of private life.
 - (iii) Further representations dated 23 September 2014 detailed

the continuing relationship between the appellant and J notwithstanding the separation two years previously.

(iv) The appellant's 2017 statement at [22] and [23].

17. The First-tier Tribunal was therefore clearly wrong in predicating part of the credibility assessment on the mistaken belief that the 2014 application was made on the basis of a relationship that no longer existed at the time. This mistake of fact played a material albeit not determinative role in the First-tier Tribunal's credibility assessment of not just the appellant but his ex-wife. She gave important evidence at the hearing confirming that their relationship broke down when she discovered that the appellant was involved in a gay relationship in 2012.

18. Second, the First-tier Tribunal has provided a single reason at [78] for concluding that the appellant has not told the truth about his family's knowledge and reaction to him being gay in the following terms:

"His sister was aware of the appellant's alleged relationship with Paul but attended the previous Tribunal case to give evidence on behalf of the appellant. I do not find that the appellant has told the truth with regard to his family."

19. The difficulty with this is that it is clear from the evidence before the First-tier Tribunal (the 2017 statement and the responses to questions 124 and 127 of the asylum interview) that the sister was not aware that the appellant was in a gay relationship with Paul or that he was gay when she gave evidence before the 2013 First-tier Tribunal. There was evidence that she disapproved of their friendship and may have had suspicions but nevertheless encouraged him to have relationships with women.

20. The attitude of the appellant's family in the UK to the appellant's relationships and sexual orientation was a significant part of his evidence. The mistake of fact regarding the sister's knowledge played a material albeit not determinative part in the First-tier Tribunal's overall credibility assessment.

21. Mr Bates acknowledged that the First-tier Tribunal was mistaken about two important aspects of the appellant's account as set out above. I entirely accept that several other reasons are provided to support the First-tier Tribunal's adverse credibility finding but I am satisfied that the accepted mistakes of fact played a material part in the reasoning of the decision-maker and it has therefore erred in law - see E v SSHD [2004] EWCA Civ 49.

(2) Approach to appellant's evidence describing the history of his claimed relationships and sexual orientation

22. At [73] the First-tier Tribunal considered there were three strands of the appellant's life which were incompatible with each other: (i) his commitment to Christianity; (ii) his relationships with women and Islamic marriage; (iii) his gay relationships. In the 2017 statement the appellant sought to provide a detailed explanation as to how confused and unhappy he was and the very slow painful journey towards living as an openly gay man who remained committed to Christianity. These explanations are summarised but no clear findings of fact are made regarding the plausibility of the explanation provided for the apparent incompatible strands in the appellant's life, particularly in light of the Asylum Policy Instruction on Sexual Orientation in Asylum Claims, 3 August 2016, which states:

"A recognition that the claimant's sexual orientation or conduct is disapproved of, either by their family or because of legal, cultural or religious mores, may lead some LBG claimants to have developed beliefs that their sexual orientation is in fact 'wrong' and which needs to be either changed and more probably, hidden. In avoiding hostility, discrimination and possibly criminal sanctions, many claimants may have kept aspects of and sometimes, large parts of their lives secret. Many will have engaged in avoidance strategies, such as, only revealing their orientation to a very limited circle of people (or to no one at all), or abstaining from any sexual or emotional relationships or living extremely discreetly. Some will have, in addition to hiding their sexual orientation, evaded detection by engaging in lifestyles that conform to normative cultural heterosexual stereotypes".

23. In a similar vein the First-tier Tribunal has concluded at [75] that the appellant provided "*false evidence*" to the 2013 First-tier Tribunal in relying upon a relationship with his girlfriend that was not genuine. The First-tier Tribunal has misinterpreted the appellant's evidence. He did not say that the relationship was not genuine: he accepted he was in a relationship with his girlfriend but that the relationship was entered mainly to please his mother and sister, and to conform to the heterosexual lifestyle demanded by his family and culture. When making its findings the First-tier Tribunal has not considered whether the appellant was engaged in "*avoidance strategies*" as distinct from providing deliberately false evidence.

Conclusion

24. This is an appeal that turned entirely on the credibility of the appellant's claim to be gay. When the errors identified above are considered together I am satisfied that the First-tier Tribunal's credibility assessment contains material errors of law and must be set aside. That would be my decision whatever the timing of the signature on the decision.

Disposal

25. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal. This is because completely fresh findings of fact in relation to detailed evidence are necessary.

Decision

26. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
27. The appeal shall be remade by the First-tier Tribunal de novo.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
23 August 2017