



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA081072016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 2 May 2017

Decision & Reasons Promulgated  
On 8 May 2017

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MM  
(Anonymity Direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A. Miah, Counsel instructed by Sony Sadaf Haroon, Solicitors  
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh, born in 1984. He arrived in the UK on 10 January 2010 as a Tier 4 student. He was granted further leave to remain as a student but on 14 August 2014 his leave was curtailed on the basis of alleged deception in relation to his obtaining and use of an English language certificate.

2. After notice of removal was served on him on 28 September 2015 he made a claim for asylum on 14 January 2016. His claim was refused in a decision dated 14 July 2016.
3. His appeal against that decision came before First-tier Tribunal Judge R. Cooper ("the FtJ") on 2 December 2016 following which she dismissed the appeal on all grounds.
4. The basis of the appellant's claim for asylum is that he is gay. When his family learnt of his sexuality they threatened to kill him. He fears return to Bangladesh on account of his sexuality, from his family, the community and the State.

*The decision of the FtJ*

5. The following is a summary of the FtJ's decision and her conclusions. The appellant and two witness gave evidence. One of the witnesses, SA, was said to be a celebrity in the Bangladeshi community and performed internationally.
6. The appellant's case was that in October 2015 he told his parents over the phone that he was gay as they were pressuring him to marry. They threatened to kill him if he returned to Bangladesh.
7. The FtJ concluded that the appellant had not given a credible account of being gay. She did not accept his claim that he had made a sexual advance to his cousin, that his mother and brother had threatened to kill him or that he lives with (the witness) SA or that he has sex with him and LR, another witness. She found that the appellant's attendance at LGBT meetings, events and venues was for the sole purpose of bolstering an untrue claim.
8. At [44] she referred to having observed the appellant and his witnesses giving evidence for over an hour. Although the appellant had generally given direct answers, largely without hesitation, his oral evidence and screening interview were substantially different in form and content from his witness statement. To summarise, she contrasted the "very great detail" of his witness statement with his answers to questions.
9. She found that there were inconsistencies between his evidence and that of SA. Although the appellant was said to have been largely consistent as to the core elements of his claim (which were summarised), the FtJ said that his account was at times lacking in detail, there were inconsistencies when the claim was subjected to scrutiny and his general credibility was damaged by the lateness of the claim.
10. Both the appellant and SA said that they had met in November 2015, that the appellant had lived in SA's flat since January 2016, that they had separate rooms and had a non-exclusive sexual relationship. However, she said that the appellant was initially thrown by the question about whether or not they used contraception. His answer that they used it "sometimes" was inconsistent with that of SA who said that they used condoms every time they had sex. Although the appellant had said that they sometimes used his condoms and at other times SA's, he did not know where

SA kept the condoms. SA's evidence however, was that they always used his, SA's, condoms.

11. At [47] the FtJ said that there were inconsistencies about the nature of the relationship between the appellant and SA. In the asylum interview he said that he loved SA and wants to be his boyfriend, and that he appeared to present to his GP that he had a partner. However, in his witness statement he claimed to be in an open relationship with both SA and LR, enjoying his freedom and making up for lost time. That was also inconsistent with SA's evidence that they have sex but are happy not being in a relationship.
12. At [48] she said that although the appellant's claim to have lived with SA since January 2016 was confirmed by SA and supported by the appellant's bank statement, it was surprising that SA's letter of support dated 24 May 2016 (which she quoted) stated simply that he had known the appellant since November 2015, they have regular contact and spend time together "as sex partner" and that they regularly go gay clubbing. That did not indicate that the appellant lives with him in the property. The letter from one SR, who gave the same address as that of SA, did not state that the appellant had been residing with him and SA for the previous six months. Other letters from his GP and Barts Health NHS at the relevant time gave a different address for the appellant.
13. The appellant's account of an incident with his cousin was found to lack credibility because of inconsistency in the account and because the appellant was unable to give even a rough estimate for when that incident happened.
14. The FtJ referred to further inconsistency in the account in that he said in evidence that he had not expressed his sexuality to anyone other than his cousin in Bangladesh, whereas in his asylum interview he said that he was verbally abused at school when he wanted to touch his friends.
15. Likewise, the FtJ did not find credible the appellant's explanation of why, in the light of his evidence, he only had his first sexual experience and involvement in the gay community in 2010, after having been in the UK for five years, and having said that he fully realised that he was gay when he came to the UK. She did not find it plausible that he would not have had the means to seek out people from the gay community of find information about gay venues, or make contact on-line.
16. The alleged threats from his family were not found to be credible for the reasons given at [52] of the FtJ's decision.
17. The FtJ said at [53] that she found both SA and LR evasive at times when their evidence was challenged in cross-examination. She referred to LR accepting that he had given evidence in eight or nine similar asylum claims based on sexual orientation. She found his description of his relationship with the appellant to be inconsistent.

18. Other statements that were unsigned and where the witnesses did not attend without explanation, were given no weight. The FtJ said that the letters consisted mainly of hearsay evidence.
19. She considered the documentary evidence that the appellant relied on but concluded that it attracted little weight, for the reasons given at [57]. She noted that it all post-dated the application for asylum in January 2016, the evidence being of attendance at LGBT events or clubs. She noted that a number of receipts from gay pubs or clubs were 'declined' or 'voided', indicating that no financial transaction actually took place.
20. At [58] she referred to the fact of the claim for asylum having been made some five years after he came to the UK, and then only after curtailment of his student visa in September 2014 and after the service of notification of removal as an overstayer. The (threatening) telephone call from his family is said to have been received a month after he was served with notice of removal. He is said to have had his first sexual relationship a month before his asylum claim, and he claimed to have started living with SA at around the time of his screening interview. Although he and LR are said to have met around March 2016, the first sexual encounter between them is said to have taken place only after the asylum interview.

*The grounds and submissions*

21. In summary, the grounds contend that the FtJ applied the wrong standard of proof in relation to her comparison of the appellant's witness statement with his oral evidence and screening interview. It is asserted that it was unfair of the FtJ to compare a written statement where a person has the benefit of legal representation and assistance in the preparation of the witness statement, with answers to questions.
22. The grounds assert that the FtJ was wrong to rely on answers to intrusive questions, for example in relation to the use of condoms, and leading to confusion on the part of the appellant. Reference is made to the decision of the CJEU, cited in the grounds as *A* (C-148/13), *B* (C-149/13) and *C* (C-150/13), Article 4 of the Qualification Directive (2004/38) and Articles 3 and 7 of the Charter of Fundamental Rights in relation to the assessment of credibility.
23. It is said in the grounds that the FtJ's assessment of credibility is otherwise flawed, for example in relation to what the appellant said to his GP. The assessment of the appellant's account of the development of his sexuality was flawed, it is contended, in particular in relation to her reliance on the appellant's evidence as to dates or time-scales.
24. The FtJ had not explained why she rejected the appellant's explanation of the timing of his asylum claim. It is lastly asserted that the FtJ did not assess the appellant's credibility 'in the round'.
25. On behalf of the appellant in submissions, the grounds were relied on. In summary, it was further contended that the witness LR had explained his attendance at other

hearings to give evidence. It did not necessarily follow that because he had given evidence in other cases he was not credible.

26. In terms of the use of condoms, the appellant's evidence was consistent and in such situations people do not behave in a "strategic fashion".
27. As to delay, the appellant had explained the timing of his claim for asylum and that he was not aware of whether he would qualify for asylum as coming within the Geneva Convention. As a lay person he could not reasonably have been expected to know.
28. The error of law on the part of the FtJ in the assessment of credibility was material because of the criminal law in Bangladesh in relation to homosexuality. Even if the law is not enforced, society and the police take it upon themselves to enforce it.
29. Mr Melvin relied on the respondent's 'rule 24' response. He submitted that there was a very high threshold in establishing irrationality. The FtJ had made clear findings and had looked at all the evidence in the round.
30. She was entitled to take into account the circumstances in which the asylum claim was made, that is after his leave was curtailed. The appellant is educated to university standard, so it is not the case, as had been suggested, that he is uneducated and would not have been able to establish that he would have been able to claim asylum on account of being gay. None of the evidence before the FtJ preceded the asylum claim. It all arose afterwards.
31. In any event, the background evidence did not support the claim that the appellant would be at risk from the authorities in Bangladesh, given that the authorities do not prosecute people for being gay.
32. In reply, Mr Miah submitted that even if the authorities do not seek to prosecute those in the appellant's situation, the definition of persecution is very wide.
33. It was not inconsistent for LR to have said in evidence that he and the appellant only had sex twice yet had said in his witness statement that they were not boyfriends but just enjoyed sexual trysts.

### *Conclusions*

34. Dealing with the grounds in turn, I do not consider that there is any merit in the contention that the FtJ failed to apply to correct standard of proof to the assessment of the appellant's credibility. There was an appropriate self-direction in relation to the standard of proof at [9] and [10] of the decision. At [43] the FtJ again referred to the lower standard of proof, and at [57] and in the concluding paragraph of the decision at [58]. In addition, looking at the decision overall, and the detailed findings, it is not apparent that the FtJ applied a standard of proof that was higher than the lower standard referred to in her self-direction.

35. The FtJ's assessment of the appellant's account in relation to his witness statement at [44] is not tainted by any error of approach, as the grounds contend. It is to be noted that in the opening sentence of that paragraph the FtJ said that she had had the opportunity of observing the appellant and his witnesses giving evidence for over an hour. She set out their evidence in detail, and plainly had a good grasp of the various facets of their evidence. She was entitled to contrast the detail given in the witness statement from his evidence otherwise.
36. The argument in relation to the decision in *A, B, C v Staatssecretaris van Veiligheid en Justitie* (C-148-150/13) is not fully developed in the grounds, and nor was it in submissions. The point however, relates to the questions that the appellant was asked about the use of condoms, dealt with by the FtJ in her reasons at [46] and which I have set out at [10] above.
37. The grounds state that the attempt at a hearing to seek details of, understand and assess details of "designated times" of intimacy when a condom would be appropriate, is one "that would quite possibly lead to discomfort in an appellant which may be interpreted in many ways" and that the FtJ followed an incorrect approach.
38. In *A, B, C v Staatssecretaris van Veiligheid en Justitie*, the CJEU concluded as follows:

"Article 4(3)(c) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.

Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.

Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.”

39. To summarise, the CJEU concluded that the assessment of credibility in relation to sexual orientation in asylum claims precludes the asking of questions based on stereotyped notions concerning homosexuals, questioning in terms of sexual practices, assessment by way of submission of the applicant to ‘tests’ to establish homosexuality or reliance on films of homosexual acts, or the rejection of credibility “merely” because an applicant did not rely on his declared sexual orientation on the first opportunity when making the asylum claim.
40. It must by now be obvious that in an assessment of credibility of a person’s sexual orientation great care must be taken to avoid stereotypes, to ask questions sensitively taking into account the individual’s personal circumstances, background and culture, and usually, if not always, to avoid detailed intimate questioning. The value of the latter sort of questioning is likely to be limited given the nature, breadth and individual experience of sexuality.
41. In relation to the questions that were asked about the use of condoms, I do consider that it would probably have been better had the questions not been asked, because of the many potential pitfalls associated with such questions. However, it is not suggested, and there is nothing to indicate, that the questions led to “discomfort” for this appellant as speculated in the grounds. The issue that the FtJ dealt with in this respect was one of straightforward inconsistency in the account.
42. As a matter of principle, it is also worth noting that in *A, B, C v Staatssecretaris van Veiligheid en Justitie*, it was said that assertion by a person as to their sexuality may require confirmation [51], and that an assertion of sexual orientation may permissibly be subject to an assessment process [52]. In other words, it is for the applicant to establish the veracity of the claim.
43. The grounds do not reflect the FtJ’s conclusions on this issue. The FtJ did not make, or seek to make, any assessment of when use of a condom may be appropriate. Nothing to that effect is evident from her decision.
44. The evidence of what the appellant said to his GP about having a partner and the FtJ’s assessment of this at [47] as being inconsistent with other evidence, forms but a fraction of the FtJ’s conclusions on credibility. In any event, the FtJ was perfectly entitled to conclude that telling the GP that he has a partner in SA and stating to similar effect in his asylum interview, was inconsistent with the witness statement where he states that he is in an open relationship with SA and LR, was enjoying his freedom and was making up for lost time. The statements may not necessarily be inconsistent, but on the facts of this case, considering all of the evidence, the FtJ concluded that they were, and there is no error of law in her having done so.

45. It is not correct to assert that there was an “over reliance” on the part of the FtJ on fixed dates for certain events. In this context, the grounds refer to [49] of the FtJ’s decision. However, in that paragraph the FtJ referred to the appellant’s inability to give even a rough estimate, even to within a couple of years, for when he told his cousin about his sexual feelings. She found that that would have been a significant event in the development of the appellant’s sexual identity or awakening which he ought to be able to remember as to date, even roughly. Furthermore, the appellant’s account of that incident with his cousin was itself inconsistent.
46. Again, the grounds mischaracterise the FtJ’s conclusions in this respect. She did not, as the grounds suggest, question the clarity of his recollection of his age and the dates for when he became aware of his attraction to boys. The grounds extrapolate the particular findings of the FtJ in relation to a specific event into findings that the FtJ never made, namely in terms of general findings on the appellant’s emerging sexual awareness.
47. Contrary to what is asserted in the grounds, the FtJ did explain why she found that the timing and circumstances of the appellant’s claim for asylum adversely affected the credibility of the claim. It was a claim made five years after his arrival in the UK, after curtailment of his student visa and after notification of removal. The FtJ concluded that the sequence of events was indicative of a claim constructed to as a means to remain in the UK after failing to establish entitlement to remain as a student.
48. Furthermore, it was relevant that the documentation relied on, the alleged threatening phone call from his family, his apparent first sexual relationship and the time when he started living with SA, all occurred at about the time of, or after, his claim for asylum.
49. The FtJ gave a variety of reasons for rejecting the credibility of the appellant’s account, in terms of inconsistency, plausibility and in relation to the circumstances of the claim. She saw and heard the witnesses give evidence. Neither the grounds nor the submissions reveal any error of law on the part of the FtJ in her assessment of the appellant’s credibility. Accordingly, this appeal is dismissed.

#### *Decision*

50. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal therefore stands.



**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.

Upper Tribunal Judge Kopieczek

4/05/17