



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00890/2015

THE IMMIGRATION ACTS

Heard at Field House
on 30 April 2018

Decision & Reasons Promulgated
on 11 May 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SS

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico, Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Ms Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Goodman (the judge), promulgated on 19 October 2017, in which she dismissed the appellant's appeal against the respondent's decision dated 19 August 2015 refusing his protection and human rights claims.

Factual Background

2. The appellant is a national of Gambia, date of birth 7 March 1981. In his statement dated 27 September 2017 the appellant maintains that he arrived in the UK in 2002. According to the Reasons for Refusal Letter however the appellant was granted leave to enter the UK in 2003. Further applications for

leave to remain as a work permit holder were unsuccessful and, on 29 April 2008, he was deemed an overstayer. Also in April 2008, the appellant was arrested for fraud and sentenced to 16 weeks imprisonment. He claimed asylum on 16 May 2008 based on his alleged political activity in Gambia. In June 2009 the appellant received a second prison sentence for offences of fraud and burglary. His asylum claim was refused on 15 September 2009 and an appeal dismissed on 21 June 2010. In November 2010 the appellant made further representations in respect of a fresh asylum claim, again based on his political activities. On 25 January 2011 the respondent refused to accept these representations as a fresh claim under paragraph 353 of the immigration rules. Further representations were made in respect of a new asylum claim, this time based on the appellant's homosexuality.

3. In brief summary, the appellant claimed that he became aware that he was gay around the age of 15. Since around 2003, after he entered the UK, the appellant formed friendships and relationships with several men, although in his asylum claim of 2008 he maintained that he had been in a relationship with a woman which lasted 2 to 3 years. The appellant met LR, a Jamaican national recognised as a refugee based on his sexual orientation, in May 2010, and they commenced a relationship around August 2010. The appellant maintained that faced a real risk of persecution as an openly gay man if returned to Gambia.
4. The respondent did not accept that the appellant was gay. The appellant's relationship with LR was considered to be one of friendship only. The respondent rejected the appellant's claim to be a member of a Particular Social Group based on his sexual orientation. The respondent additionally rejected the appellant's article 8 claim.

The decision of the First-tier Tribunal

5. The judge noted that the "real issue" in the appeal was whether the appellant was gay, and more particularly, in a relationship with LR. The judge then identified the principle evidence before her and the relevant legal framework. Under the heading "Factual Assessment" the judge considered the principal factual assertions constituting the appellant's claim and, on several occasions, analysed and commented on that evidence. The judge considered, *inter alia*, evidence relating to and arising from the appellant's relationship with LR (whose name she occasionally misspelt), evidence from "C" W (it is highly likely that the judge meant "D" W), a close acquaintance of LR, evidence of the appellant's observance as a Muslim, and the evidence of JM, a bisexual refugee. The judge additionally considered short letters written by various individuals in 2013 and 2011 maintaining that the appellant was gay.
6. In the section of her decision headed 'Discussion' the judge found the evidence that the appellant was in a long-term relationship with "LB" (presumably the judge meant LR) to be "not altogether convincing" [42], even taking into account the difficulty the appellant may have experienced in acknowledging his

sexuality because of his upbringing. The judge found that the appellant and LR did not seem to spend much time together and that, "... It appears doubtful that they have been seen [sic] each other even as often as every other weekend, and there is very little detail about the nature of the relationship." The judge found there was little evidence of mutual affection and held against the appellant differences in evidence relating to the giving of presents. The judge found there was, "... little in the way of evidence from other people, even CW [presumably the judge meant DW], who is an old friend, while making allowances for the disappearance of earlier supporters." The judge rejected much of the documentary evidence and found that the photographs of the "claimant" and "LRd" [presumably LR] were "... no more telling of an intimate or affectionate relationship than photographs taken with strangers at demonstrations." The judge found the short letters dating from 2011 and 2013 from people who were no longer contactable to be "uninformative". The judge held against the appellant discrepancies in his evidence concerning events in Gambia and, taking into account his offences of dishonesty and his allegedly false claim to have been in a relationship with a woman for 2 ½ years, and the delay in his asylum claim, the judge found that the appellant had not established, to a reasonable degree of likelihood, that he was gay.

The challenge to the First-tier Tribunal's decision

7. The grounds of appeal, as amplified by Mr Chirico in his oral submissions, content that the judge failed to make any or clear findings in respect of the evidence of DW and JM, both of whom provided witness statements and gave oral evidence. There was said to be inadequate, if any, engagement with their evidence, and no material findings of fact were made. Nor were there any or clear findings about the evidence of LR. The judge was additionally said to have erred in law by drawing adverse inferences on the basis of discrepancies when there were no actual discrepancies, and that the judge in properly characterised the letters from a number of individuals who did not give oral evidence as "short and uninformative".
8. Ms Willocks-Briscoe submitted that the judge made specific findings from [19] to [37] identifying a number of inconsistencies, including differences in evidence relating to the giving of presents. The judge had been entitled to rely on the inconsistent evidence before her and she was entitled to reject the evidence that the appellant was gay for the reasons given.
9. Having carefully considered the judge's decision and the documents provided by both parties, and having considered the representations, I indicated that I was satisfied the decision contained material legal errors.

Discussion

10. The judge's determination contains a number of typographical errors and misspellings of important witnesses. Some of the sentences are also difficult to

understand. This does not amount to a legal error but it does indicate that the judge did not adequately reread her decision before promulgation. Whilst I appreciate the significant pressures on judges to issue timely decisions the production of decisions containing a large number of errors suggests the case was not prepared with sufficient care.

11. The judge found there was “little in the way of evidence from other people, even CW”. Quite apart from getting his 1st name wrong, the judge failed to engage with and make material factual findings in respect of the evidence from DW. In his evidence CW indicated that he had known LR for 25 years, that LR was known on the gay scene as ‘Mother’ that LR introduced the appellant as his partner in 2010 and that they have been in a relationship since then. DW described the appellant and LR as a committed couple, that the appellant made LR happy, and that LR talked about the appellant often. This evidence is self-evidently relevant to the question whether the appellant and LR are in a relationship, and whether the appellant is gay. The judge however failed to make any sufficiently clear or satisfactory findings in respect of this evidence. It is not clear whether the judge accepted this evidence or rejected this evidence and, if the latter, no reasons were provided for this rejection. There was certainly no express finding that CW was a liar.
12. Similar criticism can be made in respect of the judge’s failure to engage with the evidence from JM. In his statements and his oral evidence JM described how the appellant had been very open with him about his sexuality in 2010, how difficult he found it to come out as a gay man and how he spoke about his partner, Lincoln. This was evidence that the appellant identified as being gay in private, that he gave a consistent account of his coming out and a consistent account of his relationship with LR. It was incumbent on the judge to engage with this evidence and make appropriate findings. The judge fails to do so. As a result, it is impossible to know what the judge made of this evidence. Her failure to make clear findings or to give reasons for rejecting this evidence amounts to a material error of law.
13. Although the judge gave several reasons for finding the appellant’s relationship with LR was weak, she failed to adequately engage with material aspects of LR’s evidence. It was not disputed that LR is a LGBT activist, that he had been subjected to ill-treatment amounting to persecution in Jamaica, and that he said he would not support somebody who was not gay having known what other black gay men and lesbians go through. The judge failed to assess this evidence. Nor has the judge made any clear finding whether LR is a credible witness. I am also persuaded that the judge may have applied too high a standard of proof at [42] where she found that the appellant’s evidence of his relationship with LR was “not altogether convincing”. The appellant does not need to ‘altogether convince’ the Tribunal that he is gay, he only needs to demonstrate that there is a ‘real risk’ or a ‘reasonable degree of likelihood’ that he is gay. While the judge may have inadvertently used this phrase but still had the lower standard of proof in mind, she then finds, in the same paragraph, that it “appears doubtful that they have been seen [sic] each other even as often as every other weekend”.

It is not necessary for the appellant to prove that something is not 'doubtful', but rather that there is a real risk that it is true. Although the judge correctly directs herself in respect of the burden and standard of proof at [15] and [43], I am satisfied that her misdirections at [42] are sufficient to render the determination unsafe.

14. It is apparent that there are a number of inconsistencies in the evidence presented on the appellant's behalf. The appellant has offences of dishonesty and he failed to mention his sexual orientation in his earlier asylum claims, which were rejected. It cannot however be said that, had the judge not committed the errors of law identified above, that her decision would inevitably have been the same.
15. Having considered the representations from both parties, and having regard to the section 7.2 of the Tribunal Practice Statement, I am satisfied that the identified errors of law have deprived the appellant of a fair hearing and the First-tier Tribunal's factual findings are rendered unsafe. In these circumstances I consider it appropriate to remit the case back to the First-tier Tribunal, to be heard afresh by a judge other than judge of the First-tier Tribunal Goodman.

Notice of Decision

The First-tier Tribunal's decision is vitiated by material legal errors. The case is remitted back to the First-tier Tribunal for a fresh hearing before a judge other than judge of the First-tier Tribunal Goodman.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.



4 May 2018

Signed
Upper Tribunal Judge Blum

Date