Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14194/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th April 2019	**On 10th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

AJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Harris, Counsel, instructed by Duncan Lewis & Co Solicitors (Harrow Office)
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

This is an appeal from the decision of Judge Herlihy who, in a decision promulgated on 14th February 2019, dismissed the Appellant's appeal against refusal of his protection claim. All references in this decision are, unless the contrary is stated, to the paragraph numbers of Judge Herlihy's decision.

The Appellant is a citizen of Pakistan who claimed to be at risk of persecution from state and non-state actors in his home country by reason of his homosexual orientation. He relied at the hearing in the First-tier Tribunal upon

his own oral testimony, that of one MH and JH, together with evidence contained in letters from six other individuals. Each of the supporting witnesses, and I include those who wrote letters, stated that they believed the Appellant to be genuinely homosexual.

In assessing the Appellant's credibility, the judge took as her starting point the decision of Judge Housego, who had dismissed an appeal by the Appellant against a previous refusal of his asylum claim that had been made upon essentially the same grounds. Judge Housego had not found the Appellant credible: see paragraphs 37 and 38. Whilst noting that there was evidence of the Appellant's subsequent attendance at LGBT groups and events, the judge attached little weight to this given that he had not attended such events during the six years or so that he had been residing in the UK prior to make his first failed asylum claim in August 2017: see paragraphs 39, 45, 49 and 50.

The judge was also struck by the Appellant's failure to mention his supposed sexual orientation during the course of the various human rights appeals and judicial review applications he had made between 2015 (when his final grant of leave to remain expired) and his first asylum claim (made in August 2017) for which the judge considered he had failed to provide a satisfactory explanation: see paragraph 49. Finally, the judge concluded that there was no satisfactory evidence of the Appellant having been involved in any kind of gay relationship: see paragraph 50.

The judge attached very little weight to the letters written by the individuals in support of the appeal. She gave five reasons for this. Some of these were of general application whilst others were specific to the letters in question. They may conveniently be summarised as follows:

None of those who had written letters had attended the hearing and their evidence had thus not been tested in cross-examination.

Given that the authors of the letters claimed to have known the Appellant from dates spanning between 2015 and 2017, it was reasonable to expect them to explain why they had not supported his original asylum claim or the subsequent appeal from its refusal in 2017. They had nevertheless failed to provide such an explanation: see paragraph 45.

The contents of many of the letters lacked cogency and relevant detail (see, for example, the analysis of the respective letters of Mr McD, and that from "the London friend" at paragraph 40).

There was an anomaly between a letter from IH and the testimony of JH concerning the period over which the Appellant had been attending a support group for gay men: see paragraph 43.

There was also an anomaly between the letter from Mr A and the testimony of the Appellant concerning whether they had had intimate sexual relations with one another.

The judge took a very different view as between the two witnesses who gave oral testimony in support of the appeal.

In the case of JH, she described him as an, “obviously well-meaning man”, whom she had, “no reason to doubt”, was other than genuine in his belief that the Appellant is gay. She did however note that JH was unable to proffer an explanation for why the Appellant had not availed himself of the opportunity between 2010 and 2018 to join any of the gay organisations to which he currently belonged: see paragraph 46.

The judge did not however find MH to be a credible witness given that (a) he had himself tried and failed to achieve refugee status on the basis of his claimed homosexual orientation (see paragraphs 47 and 48), and (b) could not give the name of the LGBT organisation to which he claimed to belong (see paragraph 48). The judge nevertheless took a balanced view of his credibility inasmuch as she rejected a suggestion by the Presenting Officer that MH’s credibility was further undermined by an anomaly in his evidence concerning whether he had exhausted his rights of appeal against refusal of his own asylum claim: see paragraph 47.

I turn now to the Grounds of Appeal. Those grounds may conveniently be summarised as follows (all references in this paragraph are to the paragraphs of the Application unless the contrary is stated) -

The judge failed to attach appropriate weight to the letters of supporting witnesses who had not given oral testimony at the hearing: paragraphs 4 and 5.

The judge further erred in –

failing to give reasons for, “rejecting JH’s evidence” (paragraph 11);

finding that –

i. there was an anomaly as to where MH first met the Appellant;

ii. it was incredible that MH did not know the name of the LGBT organisation to which he belonged.

The judge was wrong not accept the evidence of MH that he attended LGBT house parties with the Appellant. The judge was also wrong to dismiss the evidence of those who had written letters, “for a variety of reasons”, without addressing her mind to the question of whether their evidence was, “reasonably likely to be true or probative” (paragraph 18).

The judge erred in “entering into the arena” in a manner that would appear unfair to an informed observer by (i) asking MH if he did not think it odd that someone who had been in the UK since 2010 was not a member of any gay organisation until 2018, and (ii) challenging the witness over the assertion in his statement that he “usually” attended LGBT events with the Appellant whilst also stating in his oral testimony that he had only attended one such event with him (an event in Hackney).

Turning to the first ground, there are said to be two discrete errors.

Firstly, it is said that the judge did not explain why very little weight should be placed on the written evidence of the seven individuals who wrote letters (one of whom also gave oral testimony) notwithstanding that she appeared to accept that they genuinely believed the Appellant to be gay. I reject this ground for these reasons. Firstly, it is contradicted by the arguments put forward in the third ground, wherein it is said that the detailed reasoning given by the judge for attaching little weight to the letters is flawed (see paragraph 5, above). It is obviously inconsistent to argue on the one hand that the judge failed to give any reasons for why she attached little weight to the letters whilst attacking those very reasons in a discrete ground of appeal. I will therefore consider the criticism of the reasons given by the judge for attaching little weight to the letters when I turn to consider Ground 3.

Secondly, it is said that the judge misinterpreted the reasons given by the authors of the letters for concluding that the Appellant was gay. However, it seems to me to be implicit in her analysis (as the grounds themselves appear to acknowledge) that the judge accepted those witnesses were genuine and sincere in their belief that the Appellant was gay. This did not however mean that the judge was required to attach significant weight to those beliefs, however sincerely held they may have been. It is right to observe that Mr A gave a further reason in his letter for believing the Appellant to be gay; namely, that he claimed to have had sexual relations with him, "a couple of times" (see paragraph 6 of the Application). However, that evidence was itself problematic, for the reasons that I shall consider when I turn to the third ground: see paragraph 22, below.

There are several aspects to the second ground of appeal.

Firstly, it is said that the judge failed to give reasons for rejecting JH's evidence. However, the premise on which this ground is founded is simply wrong. The judge did not at any stage reject JH's evidence. On the contrary, as I noted at paragraph 7 above, she accepted JH's evidence as that of a genuine and honest witness. It nevertheless did not follow from this that the judge was required to accept JH's view of the Appellant's sexuality, however sincerely held that view may have been. An honest and genuine witnesses may be mistaken, and several genuine and honest witnesses may all be mistaken about the same issue. This ground thus appears to confuse the discrete concepts of the credibility and reliability of the witness.

Secondly, it is complained that the judge failed to give reasons for finding that there was an anomaly as to where MH first met the Appellant. In my judgment, this criticism is again based on a false premise; namely, that the judge found that there was such an anomaly. What the judge said was as follows:

> "48. He [MH] clearly stated in his letter of support, which he adopted, that he met the Appellant in February 2018 at an LGBT event in Hackney Health Centre and it was the Appellant's evidence that this was organised by the NHS" (emphasis added).

My reading of this is that whilst the accounts of the two witnesses were expressed differently, they were nevertheless mutually consistent. Had

> the judge been making the point that the witnesses had given inconsistent accounts, then she would have used the word, "whereas", rather than the emphasised word, "and" in the sentence quoted above.

Thirdly, it is said that the judge failed to explain why it was incredible that MH did not know the name of the LGBT organisation to which he belonged. However, there comes a point when it is simply not possible further to explain something that is in any event self-evident. In my view, this is a case-in-point. One must of course be cautious about applying a subjective view of plausibility. Nevertheless, as a matter of common sense, it does not seem to me to be unreasonable for a judge to find it difficult to accept that a person who is supposedly a genuine member of an organisation should be unable to provide its name. In short this was a finding that was in my view reasonably open to the judge on the evidence.

The first part of the third ground is that the judge failed to give reasons for not accepting the evidence of MH that he and the Appellant had attended LGBT house parties together. However, this criticism is inconsistent with what is said in the fourth ground, namely, that the judge entered into the arena when seeking to clarify an apparent anomaly between the evidence he gave in relation to this issue and that of the appellant. It is hardly open to a party to complain that a judge failed to give reasons for not accepting the evidence of a witness, whilst simultaneously complaining that the reasons given for not doing so were based upon replies that resulted from improper questioning of that witness. I will therefore consider the latter criticism when I turn the fourth ground.

The second part of the third ground is that the judge dismissed the evidence of those who had written letters without addressing her mind to the question of whether their evidence was "reasonably likely to be true or probative". I have two related points to make about this Ground of Appeal.

Firstly, it is not the case that the judge "dismissed" the evidence of the authors of the letters. What the judge in fact did was to attach "little weight" to their opinion (and it was no more than this) that the Appellant was gay. As I noted at paragraph 11 above, this ground appears to contradict the first ground (that the judge failed to give any reasons at all) in now accepting that the judge gave "a variety of reasons" for attaching little weight to the opinions expressed in those letters.

Secondly, judges are often criticised for treating individual aspects of the evidence as determinative of an appellant's credibility rather than considering them in the round within the context of the evidence as a whole. This frequently occurs where medical evidence is considered as an 'after-thought' following a series of adverse credibility findings that are based solely upon the Appellant's narrative of events. However, and for similar reasons, a judge is also well-advised not to make positive credibility findings based on individual aspects of the evidence as opposed to considering the weight attaching to them within the context of the evidence as a whole. Moreover, as with the criticism made of the judge's approach to the evidence of JH (see paragraph

15, above) this ground appears to confuse the discrete concepts of a credibility finding relating to the primary facts and the weight attaching to an honest but possibly mistaken belief.

The final point to make in relation to the third ground, is that the judge gave an entirely sustainable reason for attaching little weight to the testimony of Mr A given that he had claimed in his letter to have had sexual relations with the Appellant whilst the Appellant did not claim to have been involved in such a relationship: see paragraph 44 of the Decision.

I turn, finally, to the fourth ground, which suggests that the judge 'entered into the arena' in a manner that would have appeared unfair to an informed observer. There are two aspects to this ground.

The first is that the judge asked MH if he did not think it odd that someone had been in the UK since 2010 without being a member of any gay organisation until 2018. Miss Harris, who appeared at the hearing but did not settle the Grounds of Appeal, argued forcefully that there may be many reasons why a gay man would be discreet about his sexuality for many years prior to leading an openly gay life. She supported her argument by extensive reference to background material on the subject. However, none of this appears in the Application upon which permission to appeal was granted and it is not therefore relevant to the appropriateness or otherwise of the judge asking MH the question in the first place. So far as that issue is concerned, whilst the question could no doubt have been expressed in a less tendentious manner, it would not in my judgement have appeared to an informed observer to be unfair for the judge to afford MH an opportunity to comment upon the Appellant's journey from a discrete to an openly gay lifestyle.

The second aspect of this ground of appeal is concerned with what the judge herself characterised as her "challenge" as to what she considered to be a previous inconsistent statement by MH. Leaving aside that characterisation for the moment, the exchange between the judge and MH is detailed at the end of paragraph 34 of the judge's decision:

> "I asked the witness [MH] how he meets these mutual friends and he said that when a friend holds a house party they will go there and meet each other and he said that his partner used to attend there. I asked the witness what LGBT events he had attended with the Appellant and he said he had only attended one event in Hackney. I asked the witness why in his letter he said that he usually attends LGBT events with the Appellant which suggests that they attended more than one. He said that they attend house parties and gatherings together. I asked the witness if LGBT events are house parties and he said they were and were attended by gay and bisexual people."

It is obvious from the above that the judge's characterisation of her questioning of MH as, "a challenge", was inappropriate. What she really did was no more than to afford the witness an opportunity of explaining what appeared to her to be an apparent inconsistency between the evidence he had given in his oral testimony and what he had previously said in his written statement. Judges are

frequently criticised for failing to afford a witness an opportunity to explain anomalies in their evidence before drawing adverse conclusions from them. However, it seems to me that in this instance the judge is being criticised precisely because she did provide the witness with such an opportunity. In my judgment, the judge acted impeccably. She asked her questions at the conclusion of re-examination. She asked them in a non-aggressive, non-leading and open way. She did no more than was suggested as appropriate by Mr Justice Ouseley in the case of **JK (Conduct of Hearing) Ivory Coast** [2004] UKIAT 61:

> "It is perfectly proper for the Adjudicator to ask … why a witness has said x when earlier that or another witness has said y …". That was all that the judge did in this case. Indeed, the witness provided an explanation which, as it happens, the judge did not find satisfactory."

Miss Harris argued that the judge failed to explain why MH's explanation was not satisfactory. However, that is not a matter that was raised in the written grounds. Rather, the point made in the written grounds is that the judge should not have asked the question(s) in the first place. For the reasons given above, I wholly reject that argument.

I am thus satisfied that the judge attached the weight that she thought was appropriate to the various aspects of the evidence and gave adequate reasons for doing so. I am also satisfied that she made findings on all relevant issues, approached the evidence in a holistic manner, and asked questions of the witnesses that were entirely appropriate with a view to affording them an opportunity to clarify and explain apparent anomalies in their testimony. I accordingly find that none of the Grounds of Appeal are made out and this appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed

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.

Signed Date: 5th May 2019

Deputy Upper Tribunal Judge Kelly