Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12365/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 7 December 2020	**On 31 December 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S O

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Ball, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer.

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves a protection claim, I consider it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Mr J C Hamilton promulgated on 12 May 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 6 December 2019 refusing his protection and human rights claims.

2. The Appellant is a national of Ghana. He arrived in the UK on 2 October 2019 with a business visit visa. He had asserted in the application form that he was married and had a child. Although he continued to say that this was the case when stopped on arrival, he says that this was a false assertion and that he was told to give that story by the person who completed the visa application. The Appellant was refused entry at port. He was detained pending removal and claimed asylum on 4 October 2019. The Appellant claimed asylum on the basis of his sexuality – he claims to be gay. He also claimed to have been the subject of exploitation/forced labour. That claim was rejected by the National Referral Mechanism ("NRM") by a decision dated 28 October 2019.

3. The Judge found as a fact that the Appellant is not gay. The Appellant's account of past ill-treatment was not accepted. The Judge therefore went on to find that the Appellant would not be at risk on return to Ghana. He also rejected the claims made based on Article 3 and 8 ECHR.

4. The Appellant challenges the Decision on two grounds. First he says that, although the Decision is "in many places patient and thoughtful", it is deficient in its reasoning, in particular as regards the relationship which the Appellant claims to have entered into in the UK in November 2019 with another (Nigerian) asylum seeker, "SMO". Second, he says that the Judge's conclusion that "the Appellant's account of his developing awareness of his sexuality was vague, implausible and lacked emotional depth" ([53] of the Decision) was "not reasonably open to him". The Appellant draws attention to an extract from the Home Office's Asylum Policy Instruction entitled "Sexual Orientation in Asylum Claims" Version 6.0, 3 August 2016 ("the API") and contends that the Judge's approach runs counter to what is there said.

5. Permission to appeal was refused on the papers on 12 June 2020 by First-tier Tribunal Judge Davidge in the following terms so far as relevant:

> "..2. I find that the grounds are not arguable. The judge has reached his conclusions after careful and correct self-direction. As the grounds acknowledge this is a careful and thoughtful decision. The grounds take no issue with the adverse credibility findings of the judge at paragraph 45 when he notes that contrary to the representative's skeleton argument the claim was not made on arrival and that the Appellant when interviewed at the immigration desk continued to assert that he was married consistently with the marriage certificate that he had produced in his visa application. A certificate which he subsequently asserted as false. The Appellant's

> account of his mother reporting him to the police on account of his sexuality was not accepted. The difficulties with the documentary evidence brought forward in that regard have been fairly dealt with by the judge. The assertive evidence that the Appellant brought forward in the context of the claimed gay relationship was not determinative and contrary to the grounds it was open to the judge to conclude that the Appellant had not established that he was gay."

6. On renewal of the application to this Tribunal on the same grounds, permission to appeal was granted by UTJ O'Callaghan on 17 August 2020 on the basis that both grounds are arguable.

7. The Respondent filed a Rule 24 Reply on 2 October 2020 seeking to uphold the Decision. The Respondent pointed out that she had taken the position at the hearing in the First-tier Tribunal that, even if the Appellant was gay as claimed, he would not be at risk on return. It was "regretted that the FTT did not go on to consider the claim at its highest given the Appellant's claimed sexuality was not conceded as being determinative of risk". Neither Mr Ball nor his instructing solicitor had seen the Rule 24 Reply. I therefore read out the above as the remainder merely sought to uphold the Decision. I heard submissions from Ms Everett as to the impact of the point made in the Rule 24 Reply.

8. The hearing before me was conducted via Skype for Business. Aside some minor issues with the sound on Mr Ball's connection (which did not affect his submissions), there were no technical difficulties and both parties confirmed that they were able to follow the proceedings throughout. I was helpfully provided with a consolidated Appellant's bundle for the hearing which included the bundle previously before the First-tier Tribunal. I refer to documents in that bundle as [AB/xx].

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

10. I take each of the grounds in order although there is a degree of overlap between the two and I will need to consider the two together in my conclusions in order to assess the Decision as a whole.

Ground 1

11. As I have indicated above, the person with whom the Appellant claims to be in a relationship (SMO) is himself an asylum seeker. Presumably he seeks asylum also based on his sexuality although he does not say as much in his statement or letter dated 16 December 2019 ([AB/75]). Neither representative was able to tell me whether SMO's own claim has been accepted. The Appellant was also present remotely at the hearing but did not participate. In addition to the statement/letter from SMO, written whilst

both he and the Appellant were in detention, the Judge heard oral evidence from SMO. He also had before him e-mails between the Appellant and SMO which he described at [78] of the Decision as "quite explicit".

12. The Judge considered this aspect of the Appellant's claim at [79] to [81] of the Decision as follows:

> "79. By the time of the appeal hearing, SMO had been released from detention. When he gave evidence, the Appellant said that they were seeing each other about 3 times a week. They would hang out together and sometimes SMO would come back to the Appellant's home and they would have sex there. SMO gave evidence and said he had been released from detention for 19 days. His account of his relationship was consistent with the account given by the Appellant.
> 80. However apart from the e-mails, which were generated by the Appellant and SMO themselves, there was no independent or other evidence to support their claim to have been in a relationship. There was no independent or other evidence of contact between them after SMO was released. There was no independent or other evidence to support SMO's claim to be gay or to show the basis upon which he had applied for asylum. Furthermore, it is arguable the email correspondence between them between the time the Appellant was released and SMO was released was limited and not consistent with the apparent intensity of their relationship. The Appellant said they communicated mainly by telephone but no evidence of this was produced.
> 81. The Appellant's claimed relationship with SMO is consistent with the Appellant being gay. However it could also be consistent with an attempt to create the false impression that this is the case. I take all this into account when considering the evidence as a whole."

13. I accept as Mr Ball submitted, that it is difficult to see what evidence of telephone contact would add to the e-mails as such evidence would only show contact between telephone numbers and not what was discussed. Such evidence might, I suppose, indicate the frequency of contact. The frequency of contact disclosed by the e-mails is a point taken against the Appellant.

14. In any event, though, as Ms Everett pointed out, this was not the only "independent" evidence which the Appellant could have adduced. He is living with his uncle and aunt. The Judge records at [82] of the Decision the Appellant's evidence that "[a]ll the members of his uncle's family were aware of what had happened and were sympathetic towards the Appellant and accepted his sexuality". He was asked why his uncle or aunt had not made statements or attended to give evidence and said only that "his uncle was in Ghana and his aunt was at work" ([83] of the Decision). As the Judge there records, "[i]t should have been relatively easy for the Appellant to obtain statements from them and secure their attendance or provide credible evidence for not doing so". Particularly in circumstances where the Appellant claimed that he and SMO were having sexual relations at the Appellant's home (which is with his uncle and aunt – [82] of the Decision) such evidence might, as the Judge found, have been helpful.

15. Mr Ball was particularly critical about what is said by the Judge at [81] of the Decision. However, I agree with Ms Everett's submission in that regard. It is no more than the Judge indicating the two possible alternative views which he could reach about this evidence when considered as part of the whole picture; either the evidence supported the other evidence and showed that the Appellant is indeed gay or he and SMO have fabricated it in an attempt to bolster both the Appellant's case (and probably also that of SMO).

16. Leading on from that submission, Mr Ball was also critical about the way in which the Judge has reached his findings both here and elsewhere in the Decision, indicating what of the evidence assists the Appellant and what does not but then simply adding that into the balance without reaching a firm finding. It was, Mr Ball submitted, difficult to know therefore why the Judge had reached the concluded findings he had. I reject that submission. I agree with Ms Everett's submission that this is simply indicative of a careful and cautious approach by the Judge who has balanced all the evidence before reaching any conclusion. I will need to return to this point below after I have considered the Appellant's second ground.

17. For the moment, on ground one taken alone, I do not consider that there is an inadequacy of reasons when those reasons are weighed in the balance with the rest of the Judge's findings. I accept of course that just because the Appellant is not believed on part of his account does not mean that it is all untrue. However, if the Judge found and was entitled to find that other parts of the Appellant's case as to his sexuality, were untrue, that would need to be weighed in the balance with what is said about this aspect of the claim.

Ground 2

18. The Appellant's second ground is directed at [53] of the Decision which reads as follows:

> "In view of the above, I accept the Respondent's argument that the Appellant's account of his developing awareness of his sexuality was vague, implausible and lacked emotional depth. I take this into account when considering the evidence as a whole. However I also take into account that some people may find describing and articulating the development of their sexuality difficult and the possibility that the Appellant may not have been comfortable talking about these issues."

That last sentence takes the same approach as at [81] of the Decision to which I have already referred. The fact that the Appellant was unable plausibly to explain how he came to realise that he is gay might be explained by a reluctance to discuss such issues or it may be indicative of a lack of credibility of the claim. However, if the latter is to be the conclusion reached, that must be as part of a consideration of the entirety of the claim and evidence.

19. The Appellant's pleaded ground in this regard refers to the API which reads as follows:

> "Not every LGB person will have experience of, or be able to communicate any sense of being different. Caseworkers must be mindful that a narrative, from which the idea of difference is absent, should not imply that the claimant is being untruthful in presenting their claim. For some the process of understanding and accepting their sexual orientation may not have been accompanied by life changing 'turning points' or experiences which can be helpful in providing narrative to present their case at interview. Caseworkers should not expect narratives to contain evidence of any such turning points or milestones such as first romantic encounters, declarations of feelings to others or the joining of LGB organisations" (pg 27 of 41)

20. I make two points at the outset. First, the API is guidance for Home Office caseworkers and not judges who are entitled (indeed required) to consider all evidence before them. Second, whilst it might be right that a caseworker and for that matter a judge should not "expect" a person to provide evidence about the realisation of their sexuality, where a person offers some explanation (as here), the judge should consider it.

21. In any event, the Judge has clearly taken into account that the Appellant might not be comfortable when discussing his sexuality and has therefore weighed that in the balance. That approach is not inconsistent with the API if that did apply (which, as I have said, it does not).

22. Obviously, [53] of the Decision has to be read with the preceding paragraphs. The reasoning on this aspect of the Appellant's account begins at [47] of the Decision. There has been no challenge to paragraphs [47] to [52] of the Decision including the inconsistencies in the Appellant's account identified at [52] of the Decision.

23. For those reasons, I am unpersuaded that there is any error of law or approach disclosed by the Appellant's second ground.

24. That brings me on to a consideration of the Appellant's case that the "Judge's approach is one of cumulative errors". That is countered by Ms Everett's submission that what the Judge was required to do and has done is to look at the evidence as a whole. I therefore turn to look at the Judge's consideration of the sexuality issue on this basis.

25. I note and accept Mr Ball's submission that the Judge refers to the Appellant's account at [57] of the Decision as "quite detailed". That has to be read in context however. The comment relates only to the Appellant's account of attacks which he had suffered in Ghana on account he says of his relationship there with another man (BR).

26. I begin by setting out the way in which the Judge approached his credibility findings. Having noted that the Appellant did not seek to produce any documents relating to SMO's claim, that the Respondent's claim that

the Appellant had used a false passport was rejected and that he did not accept the Appellant's contention that he claimed asylum on arrival, the Judge directed himself that he had to "assess his evidence in the light of the evidence as a whole" ([46] of the Decision). The totality of the claim made by the Appellant fell into three parts. First, the manner in which he claimed to have discovered his sexuality. Second, the past ill-treatment which he claimed to have suffered on this account in Ghana (including the details of his claimed relationship with BR). Third, his current claimed relationship with SMO in the UK.

27. That then is the way in which the Judge approached the claim. I have already referred to [47] to [53] of the Decision where the Judge considered the first part of the claim. I have reached the conclusion that there is no error in that approach. I have also set out [79] to [81] of the Decision where the third part of the account is considered. I have also reached the conclusion that the independent consideration of that aspect does not contain an error.

28. Turning then to the Judge's consideration of the second part of the account, I begin by noting that there is no challenge to this part of the Decision in the grounds. Since it formed the most detailed part of the Appellant's account and the largest part of the credibility findings, however, it is appropriate for me to consider what is said at [54] to [79] of the Decision which I now turn to do.

29. The first point to be noted is that the Appellant's application for a visa asserted that he was married with a child. That is the account which he continued with on arrival ([45] of the Decision). The Appellant says that the assertion was untrue and that he was told to maintain it on arrival by the agent who procured the visa. The Judge noted the Appellant's acceptance that he had therefore obtained the visa by deception ([44]).

30. Dealing then with the Appellant's claim to have been in a relationship with BR whilst in Ghana, the Judge gave reasons at [54] to [59] of the Decision for disbelieving the Appellant's account in this regard. Those included inconsistencies and that the account was not plausible when considered in the context of the background evidence. At some points in that consideration, the Judge gives the Appellant the benefit of the doubt (for example at [55]), in others, he takes into account his finding of a lack of credibility but does not reach an overall conclusion (for example at [56]). That is a reflection of the careful assessment of all the evidence. Overall, though, at [59] of the Decision, the Judge reaches a provisional view that the relationship and how it is said that it was discovered is not credible.

31. The Judge then goes on to consider the evidence which might be said to corroborate the Appellant's account in this regard including the medical evidence, the police report, a letter from BR and BR's brother and letters from those said to have witnessed the attack ([60] to [71] of the Decision).

In that section, the Judge notes various inconsistencies in the documents and some lack of plausibility about the content and the way in which the documents were obtained.

32. At one point in his oral submissions, Mr Ball suggested that some of the inconsistencies relied upon by the Judge were not truly inconsistent (for example at [68] of the Decision). That was not part of the pleaded grounds but in any event the submission is not well-founded. Whether BR's brother is said to have known of the relationship because he was told or because he walked in on the couple matters not because the finding in that paragraph is based on an inconsistency within the Appellant's own evidence (see reference to "prevarication" and the reference to three versions of his account). The point made in the final sentence that it was "reasonable to expect [the Appellant] to have mentioned that BR's brother know about the relationship" also holds good however it is said that the brother came to know of the relationship.

33. The Judge reaches his conclusion at [71] of the Decision in relation to the documentary evidence and written evidence of witnesses. As he there notes, there are various issues raised by the witness evidence and since the witnesses were not or could not be called, less weight was given. The Judge's consideration of the documents also identified issues affecting the reliability of those documents. He was therefore entitled not to place weight on this evidence when reaching his credibility findings.

34. Paragraphs [72] to [76] of the Decision concern other aspects of the claim to be at risk which are not challenged. However, as the Judge notes at [76] of the Decision, "this part of his account [to have been a victim of forced labour] is inextricably bound up with his account of having to leave his family because of his sexuality". The claim in that regard had already been rejected by the NRM. The Judge was entitled to take that into account when assessing the Appellant's credibility.

35. Having thereafter dealt with the claimed relationship with SMO, the Judge noted the absence of evidence from the Appellant's aunt and uncle (as I have referred to above) and then concluded as follows:

> "84. Nevertheless, looking at the evidence as a whole, for the reasons set out above, I have concluded that the implausible, incredible and inconsistent aspects of the Appellant's evidence go to the core of his account. Even applying the lower standard of proof applicable in these cases, I do not find he is telling the truth. In particular I do not find:
> (1) He has shown that he is gay.
> (2) He has been in same sex relationships with BR or SMO.
> (3) He is at risk from his family in Ghana.
> (4) He is at risk from the agent he says he paid to obtain his visa.
> (5) He has shown he was the victim of forced labour or exploitation.
> It follows that I do not find he would face any risk of mistreatment were he to return to Ghana."

36. That paragraph makes clear findings with an appropriate self-direction as to the lower standard of proof. The Judge was not required to repeat his reasoning in the preceding paragraphs. He had made clear in the course of his reasoning which parts of the account he found not to be credible at all (based on either inconsistencies or implausibility when the claim was compared with either background evidence or other evidence) and which parts might be accepted so that the Appellant should be given the benefit of the doubt on those parts. He considered the evidence carefully and as a whole before reaching his conclusions. There is no error in his approach or in relation to the adequacy of his reasoning. It cannot sensibly be said that the Decision read as a whole does not contain adequate reasons for rejecting the individual elements of the claim or the claim considered holistically.

37. In light of that conclusion, I do not need to say anything about the point made by the Respondent in the Rule 24 Reply that, even if the Appellant were gay, he would not be at risk on return to Ghana. Ms Everett did not seek to persuade me that this was relevant to materiality at the error of law stage. It is an issue which might have arisen for consideration if I had found an error and the appeal was to be redetermined.

38. As it is though, for the foregoing reasons, I conclude that there is no error of law in the Decision and I uphold it.

DECISION

The Decision of First-tier Tribunal Judge Mr J C Hamilton promulgated on 12 May 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 11 December 2020