Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02009/2020**

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On the 24 September 2021 *via Teams*	**On the 08 November 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

NUS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. West, Counsel, instructed by City Heights Solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to consisted mainly of the materials that were before the First-tier Tribunal, the grounds of appeal, and the grant of permission to appeal by Upper Tribunal Judge Keith pages, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal against a decision of First-tier Tribunal Judge Bulpitt promulgated on 26 August 2020 dismissing an appeal by the appellant, a citizen

of Bangladesh born on 26 October 1989, against a decision of the respondent dated 18 February 2020 to refuse his asylum and humanitarian protection claim, made on 9 May 2018.

2. The appellant claimed asylum on the basis that, as a gay man, he would face being persecuted in Bangladesh. The judge rejected the appellant's account of his homosexuality, particularly his claimed relationship with B, a Saudi Arabian man with refugee status in this country. The appellant challenges the judge's analysis of the evidence concerning his relationship with B. He contends that the judge analysed the appellant's evidence through a heteronormative or subjective normative prism and failed properly to consider the impact of B having been recognised as a refugee on account of his homosexuality. The judge failed to give sufficient reasons, contends the appellant, for rejecting the appellant's claim to be gay.

Factual background

3. The appellant entered the United Kingdom on a domestic worker visa in September 2011. The visa expired 20 March 2012. The appellant did not leave. On 24 August 2017, the respondent served on the appellant a notice of her intention to remove him from the United Kingdom. In response, in January 2018 the appellant said that he was gay, and would be killed upon his return to Bangladesh. On 9 May 2018 he formally claimed asylum. The Secretary of State's decision to refuse his asylum claim was the decision under challenge before the First-tier Tribunal.

4. The appellant's case was that he realised he was gay when he was 10 years old. He had his first gay relationship aged 16. A neighbour saw him engaging in sexual activity with another boy and informed the other boy's family, who then threatened to kill the appellant. The appellant fled his hometown, and stayed elsewhere with a family member for two months arranged for a visa for him to travel to the United Arab Emirates. After around three years in Abu Dhabi, the appellant came to this country. Two months after his arrival, he left his employer to establish his own life. In 2017, he began a relationship with B, a Saudi Arabian man with refugee status on account of his sexuality. The appellant and B lived together for two years, before B moved his wife and children into the flat he shared with the appellant. The appellant moved out. The appellant's relationship with B continues. The appellant claimed that they continued to see each other every two to three days, and that he wanted to marry B.

5. The Secretary of State rejected the appellant's account. She considered it to have been fabricated in response to the removal notice she served on the appellant. She rejected the claimed relationship between the appellant and B. Any interference with the appellant's private life by his removal would be a proportionate interference with his rights under article 8(1) of the European Convention on Human Rights.

6. The judge heard evidence from the appellant and B. In his analysis, he attached little weight to the respondent's criticisms of the appellant's account of realising he was gay aged 10 (see [17]). He rejected the appellant's claim to have been threatened by his family in Bangladesh and found that throughout the chronology of his asylum claim, he had been inconsistent in his account of who he feared, and when, and had failed to explain what the judge described as the "divergence" in the accounts he had given. As such, found the judge, the

appellant's "shifting account" was inconsistent with it being true. He found that the appellant left Bangladesh because he had secured a visa to work in Abu Dhabi, rather than because he feared being persecuted. The appellant had made no attempts to contact K, his claimed boyfriend in Bangladesh, which was inconsistent with the account he had given of the strength and depth of his relationship. That analysis may be found at paragraphs [17] to [23] and there has been no challenge to any of it by the appellant, and I need say no more about it.

7. The judge then addressed the appellant's account of his life in this country. In light of Mr West's forensic challenges to the judge's analysis at [24] to [26], it is necessary to quote the those paragraphs in full:

> "24. Much like his account about events in Bangladesh the appellant's account about his life in the United Kingdom contains very little detail. The appellant states that two months after his arrival as a domestic worker he left his employer and tried to establish a life in the United Kingdom. In his interview the appellant says he kept his sexuality to himself, did not have any relationships before meeting B and that he started living openly only after starting his relationship with B 'but before I met him I did not have any sexuality with him it was my intention I have this was a particular boyfriend'. In cross-examination however when asked if B was his first same-sex relationship in the United Kingdom the appellant said that before meeting B he used to go out and have casual sex with other people. I find this evidence incompatible and a further example of the appellant altering his account in answer to questions if he considers it advantageous to do so.
>
> 25. The appellant's account is that he met B in a club in October 2016 and that the pair commenced a relationship and moved in together in June 2017, lived together for a year before B moved his wife and children in to live with him and the appellant moved out, though they continued their relationship meeting three or four times per week. I remind myself that while such an arrangement may not be conventional that alone does not mean the account is untrue. In his response to the notice of intention to remove him however the appellant said he was living with B and that he hoped to marry him soon. I find this statement hard to reconcile with the fact that at that time B was married with three children. I further find that the appellant has been inconsistent about when the relationship with B started with the appellant stating in the preliminary information questionnaire in July 2018 that it had begun a year earlier I.E.in July 2017. When confronted with this in cross-examination the appellant admitted the discrepancy in the evidence but blamed the person who drafted the questionnaire.
>
> 26. There is a noticeable absence of evidence to support the assertion maintained by both the appellant and B in the oral evidence, that they lived together for a year. The only

> external evidence to support this suggestion are some staged photographs outside a gay club in Soho, which the appellant said were taken with these proceedings in mind. I find it surprising that there is no other evidence of the 12 months' claimed cohabitation if the claimant were untrue. I also found the appellant and B to be particularly evasive when asked questions about their relationship. While the appellant said that he and B met every two or three days, B told me it was every two weeks, sometimes every week. Having initially said that he had not left the United Kingdom since meeting the appellant, B later accepted he had been to Holland in India, saying that he hadn't understood the original question."

8. The judge then addressed the impact of the delay in the appellant making his claim, which he found to be a factor undermining the appellant's credibility. The appellant had attributed the delay to being in a new country, without support. However, the judge found that the appellant had entered the United Kingdom in employment and with a stable address, with, on his own evidence, knowledge and understanding of the permissive laws concerning homosexuality in this country, viewing it as a safe place to stay. The judge accordingly rejected the appellant's explanation for the delay in making his claim for asylum.

Ground of appeal and permission to appeal

9. Permission to appeal was granted by Upper Tribunal Judge Keith, in the following terms:

> "While the decision was detailed and clearly structured, and an assessment of credibility is necessarily nuanced, the three grounds pursued do disclose at least arguable errors of law, bearing in mind that relationships may take a variety of forms and the FTT may have erred [by] applying some kind of conformity test, when assessing [the appellant's] credibility. Recognition of the partner's status as a refugee on the grounds of his sexuality is also potentially relevant and arguably not resolved in the appeal."

Submissions

10. At the outset of the hearing, Mr West candidly accepted that there had been no express evidence before the judge concerning the basis for B's status as a refugee. B's witness statement merely refers to being *a* refugee, but not the basis upon which he was recognised as such. Accordingly, Mr West abandoned his criticism of the judge's analysis in that respect. I consider that Mr West was right to make this concession. The judge did not make a finding that B was not a gay man, and in my judgment whether or not B held refugee status on that basis would have been immaterial to the judge's findings in any event.

11. Mr West submitted that the evidence of B was, in any event, capable of being "the most compelling evidence" in the appeal, and it was not rational for the judge to reject his evidence for the reasons he gave. By finding an inconsistency between the appellant's account of not having had any "relationships" prior to his relationship B with the appellant's revelation under cross-examination that he had had casual sexual relationships in the past, the judge fell into error,

submitted Mr West. When the appellant claimed that B was his first relationship, he meant first *non-casual* relationship. Casual sexual encounters were not "relationships", and it was not open to the judge simply to equate one with the other, without further analysis or reasoning. This was a heteronormative, or subjective normative, approach, submitted Mr West, and amounted to the judge recharacterising the appellant's conduct by reference to his own subjective concept of reasonableness, contrary to the established authorities cautioning judges against relying on their own subjective views of what is plausible in an asylum claim. The judge should have been clear as to what he meant by the term "relationship", and by failing to do so he gave insufficient reasons for rejecting the appellant's account. The findings reached by the judge were not open to him on the basis of the reasons that he gave.

12. Mr West also submits that the judge unreasonably held minor inconsistencies in the appellant's recollection of key dates in the chronology of his claimed relationship with B against him, such as whether the relationship commenced in June or July 2017 (see [25] of the decision). The judge's criticisms at [26] of the absence of evidence of cohabitation between the appellant and B failed to engage with the reality of the "hostile environment" faced by those who live in this country without leave to remain. As an overstayer, the appellant would not have been able to obtain documentary evidence. In addition, B was married, albeit living apart from his wife and children at the time, meaning he would have been reluctant to generate other evidence, such as images. In all, the judge failed to give sufficient reasons for his findings.

13. For the Secretary of State, Mr Whitwell accepted that there was some superficial force to the appellant's criticisms of the judge's conflation of casual sexual encounters with "relationships", but declined to concede the issue, and underlined the judge's broader rejection of all other aspects of the appellant's evidence, none of which had been challenged by the appellant.

Discussion

The jurisdiction of the Upper Tribunal concerning challenges to findings of fact

14. It is important to recall that the jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal is to determine whether the decision of the First-tier Tribunal involved the making of an error of law: see section 11(1) of the Tribunals, Courts and Enforcement Act 2007. Appeals do not lie to this tribunal on points of fact.

15. Findings of fact reached by First-tier Tribunal judges may involve errors of law, however, and the classic summary of when errors of fact may entail the making of an error of law may be found in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982. At [9], the Court of Appeal summarised such errors in these terms:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;

> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

16. Applying the above criteria necessarily entails reviewing the decisions made by the judge below as to what was material to the issues in dispute, the weight to be ascribed to certain matters in relation to that ascribed to other matters, and the overall approach to the entire body of evidence. As to how this tribunal should analyse those matters, the Supreme Court and Court of Appeal have given guidance as to the approach to be taken. The task calls for restraint on the part of the appellate tribunal, and deference towards the fact-finding judge.

17. In Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62], the Supreme Court held, with emphasis added:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached**."

18. Similarly, on the issue of the trial judge's assessment of the weight to be attached to individual pieces of evidence, the Supreme Court has summarised the jurisprudence on the issue in these terms. The principles, it said:

> "…may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached." (emphasis added)

See Perry v Raleys Solicitors [2019] UKSC 5 at [52].

19. In Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114.iv], the Court of Appeal observed that:

> "iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

20. By way of a preliminary observation, it is necessary to recall that the appellant has not challenged the judge's broader rejection of what he claims took place in

Bangladesh, or the judge's analysis of the inconsistencies between the evidence of the appellant and B (for example, concerning the frequency of their contact), or the finding that the delay in the appellant's claim for asylum undermined his credibility. Nor has the appellant challenged the judge's findings that the true reasons he left Bangladesh were because he had secured a visa to work in Abu Dhabi, rather than because he faced being persecuted. While I accept that the construction of the evidence for which Mr West contends could have resulted in the judge accepting the appellant's claim to be gay notwithstanding his rejection of the Bangladesh-limb of the narrative, it is nevertheless relevant to highlight the wider landscape of the judge's unchallenged findings of fact. Doing so throws into sharp relief the task of an appellate tribunal on an appeal: an appellate tribunal will necessarily be restricted to an exercise of "island hopping", to adopt the terminology of Fage UK Ltd v Chobani, in contrast to having had the benefit of the "whole sea of evidence" that was presented to, and considered by, the judge below.

21. I accept that there would have been alternative constructions of the evidence in relation to whether the appellant's prior casual sexual encounters amounted to "relationships". On the other hand, a casual relationship is still a form of relationship. What matters is whether this judge reached findings that no reasonable judge could have reached. The judge had the benefit of considering all the facts in the case, which included the appellant's substantive asylum interview in which the appellant was asked about the extent to which he was open with his sexuality in the UK: see question 154 and following. In light of Mr Whitwell's ambivalence on this issue (that is, he accepted there was superficial force to the appellant's submissions, but declined to concede the point), I indicated to the parties at the hearing that my preliminary view was that question 156 and following of the asylum interview disposed of the point, and invited submissions in response. Question 156 was as follows:

> Q. Did you conceal your sexual identity to others before your relationship with B?
>
> A. No I kept it to myself.

22. Later, at questions 158 to 160, the appellant explained that he discussed his feelings openly with friends at "the club". He did not mention having sexual encounters with friends or any others in that or any other context, and it was against that background that at question 161 the following exchange took place:

> Q. Other than with B have you had any other relationships in the UK?
>
> A. No.

23. When I highlighted the above exchanges to Mr West at the hearing, he responded by saying that there are various constructions to question 156. In my judgment, that there are a range of different constructions is, with respect, precisely the point that undermines this aspect of Mr West's submissions. I consider that the judge was entitled to find the appellant's oral evidence to have been inconsistent with the account he gave in his asylum interview. It was legitimate for the judge to conclude that it was difficult to see how the appellant could have both kept his sexuality to himself, as he said he had when answering question 156 in the asylum interview, and that he had had casual sexual relationships, as he said under cross-examination. My task is not to substitute

my own view of that of the judge below, but, as held by the Supreme Court in Henderson v Foxworth Investments Limited (see paragraph 17, above), to consider whether the decision under appeal is one that no reasonable judge could have reached.

24. Bearing in mind the judge's overview of the evidence as a whole, it was open to the judge to conclude that the appellant had been inconsistent in this aspect of his account, especially when taken alongside his broader concerns as to the evasiveness of both the appellant and B when asked questions about their relationship under cross-examination, and the fact that the only photographs of the claimed relationship were accepted to have been staged for the proceedings. Contrary to Mr West's submissions, the judge was not recharacterising the appellant's evidence through a heteronormative lens of what he considered a "relationship" to amount to; he conducted an analysis of the overall credibility of the appellant's evidence, considered as a whole, scrutinising his oral evidence against his asylum interview. It was legitimate for the judge to conclude that in order to have even casual sexual relationships, it is necessary to reveal one's sexuality to the other participant.

25. Turning to Mr West's submissions concerning the June/July 2017 discrepancy, properly understood the judge was not holding against the appellant such a minor variation in his account. At [25], the judge observed that, when the appellant completed the Preliminary Information Questionnaire in July 2018, he said that his relationship with B started around a year previously, which would have been July 2017. Yet, as the judge recorded at the beginning of that paragraph, the appellant's account had been that he met B in October 2016 (see paragraph 23 of his witness statement dated 15 April 2020) and it was June 2017 when they moved in together. It was open to the judge to ascribe significance to this discrepancy, which even the appellant himself appears to have accepted was present under cross-examination, albeit in terms that attempted to deflect the blame onto others. There is nothing to this facet of Mr West's submission. The judge was entitled to have credibility concerns arising from this inconsistency.

26. Mr West also submitted that the judge's concerns at [25] over the appellant's account of meeting with B three to four times weekly after B resumed cohabiting with his wife, and his plans to marry B, in circumstances when B was already married, were irrational, and inconsistent with the judge's own prior self-direction. In relation to the regular claimed regularity of contact between B and the appellant once B had resumed cohabitation with his wife, the judge directed himself that, "while such an arrangement may not be conventional that alone does not mean the account is untrue." Mr West submits that the judge's reasoning flew in the face of his own self-direction and was therefore irrational. I disagree; the judge's self-direction was to remind himself that unconventional relationship arrangements do not, in isolation, mean that the claimed relationship is not genuine. Mindful of that factor, the judge proceeded to analyse the evidence before him; it was open to the judge to have concerns that it would be hard for the appellant to marry B "soon", given B was at that time married with three children, bearing in mind the time that it would be likely to take for B to divorce his wife, which would be necessary first. It was not the unconventional nature of the claimed relationship that gave rise to the judge's credibility concerns, it was the whole sea of evidence before him: the inability of the appellant to marry a married man "soon"; the inconsistencies in the appellant's accounts of when the relationship commenced; the evasiveness of the appellant and B under cross-examination; the inconsistencies of their accounts of the

regularity of their contact, now that B has resumed living with his wife and children; B's absences from the UK at times when the appellant said they had continued to meet to maintain their post-cohabitation relationship (see [26]); the fact the appellant had not taken any steps to regularise his status on account of his relationship with B before being arrested (see [27]). Those were all factors the judge was entitled to take into account.

27. Mr West's final criticism of the judge's reasoning is that it was unreasonable – and therefore irrational – for the judge to ascribe significance to the absence of evidence concerning the appellant's claimed cohabitation with B. This submission is without merit. Nothing in the judge's analysis reveals that he expected this appellant to generate official documentation, or other evidence that would be unreasonable to expect from an overstayer. It is readily possible to envisage a host of evidence of the sort that would be generated even by an informal cohabitation arrangement; such as photographs (other than images staged for the purposes of the proceedings, which was the only category of photographic evidence before the judge), message exchanges generated by every day life, evidence from the appellant's friends, with whom he claimed to speak openly about his relationship with B at gay clubs, concerning the appellant's living arrangements, or what they knew of them. It was legitimate for the judge to conclude that the absence of such evidence was, when considered in the round with his broader credibility concerns, a matter further undermining the appellant's credibility.

28. Properly understood, the overall thrust of Mr West's submissions was that there were alternative constructions of the evidence that were open to the judge, and that he could have resolved the case in favour of the appellant had he adopted Mr West's preferred construction of the evidence. As the authorities set out above demonstrate, the task for my analysis is to consider whether the judge reached findings that no reasonable judge could have reached. I find that the judge reached a decision that was rationally open to him on the evidence.

29. As I conclude, I should address Mr West's sufficiency of reasons-based submissions. A sufficiency of reasons challenge may only succeed when the unsuccessful party is not able to understand why it is that a judge has reached an adverse decision, despite having the advantage of considering the judgment with knowledge of the evidence given, and the submissions made at trial: see *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at [118]. The reason the appellant's appeal was dismissed was plain from the judge's reasoning. For the reasons I have set out, the reasons why the judge rejected the evidence of the appellant were grounded in the evidence and are clear from his judgment. It is common in this jurisdiction for sufficiency of reasons challenges to be brought in circumstances that are, in truth, no more than a disagreement with the findings reached by the trial judge. That is precisely the position in these proceedings. The appeal is dismissed.

Conclusion

30. The decision of the First-tier Tribunal did not involve the making of an error of law such. The appeal is dismissed.

Anonymity

31. In light of B's status as a refugee, I maintain the anonymity order already in force.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

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 their 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 Stephen H Smith Date 4 October 2021
Upper Tribunal Judge Stephen Smith