



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04233/2017

THE IMMIGRATION ACTS

Heard at Field House
On 27 February 2018

Decision & Reasons Promulgated
On 8 June 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR G H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed, Counsel, instructed by 12 Bridge Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Pakistan, brings a challenge to the decision of First-tier Tribunal (FtT) Judge Lodge posted on 6 June 2017 dismissing his appeal against the decision made by the respondent to refuse his claim for asylum and humanitarian protection on 21 April 2017. The basis of the appellant's claim is that he would face a real risk of persecution if returned to Pakistan because he is gay. In support of his claim he had produced two FIRs dated 6 May 2012 and 17 October 2012. In the respondent's refusal letter reference was made to these two FIRs and other documents at paragraphs 48 and 49. Then at paragraph 50 it was stated:

“The FIRs and police daily report have been independently verified and found not to be genuine (HO verification request). These documents are therefore not accepted as evidence which can be relied on in support of this aspect of your claim.”

2. However, no verification report (DVR) was attached to this refusal letter and that remained the case up until the date of hearing. At the hearing the respondent’s representative applied for permission to produce two DVRs relating to the appellant’s FIR documents. The appellant’s representative opposed this request. In deciding to admit it the judge records these events as follows:

“10. For the respondent Miss Brown indicated that she wished to submit further evidence, namely, three Document Verification Reports. Ms Jones objected to their admission on the basis that the appellant would not have the opportunity to properly consider the evidence. He had not had the opportunity to make such enquiries as were possible as to the contents of the documents.

11. Looking at the reasons for refusal letter, paragraph 50, the respondent indicates that the FIR’s and police daily reports have been independently verified and found not to be genuine. I am satisfied therefore that the appellant was on notice that such evidence was in existence. Looking at the Document Verification Reports it does not seem to me that the appellant, even if he has the opportunity, would have been able to produce evidence to rebut their conclusions beyond the evidence that he has already produced. Ms Jones indicated that, in the event her application was refused she would not seek an adjournment because of the appellant’s limited funds.

12. In the circumstances, I am satisfied that the documents, being relevant to a central issue in this case, should, in the interests of justice, be admitted and I accordingly agreed to their admission. The hearing then proceeded.”

3. The principal ground on which the appellant’s challenge to the judge’s decision relies is that the judge’s decision to admit the DVR evidence was procedurally unfair because it denied him the opportunity to examine and submit additional evidence himself to rebut them.
4. Mr Ahmed developed this ground, pointing out that the respondent bore the burden of proving falsity of any documents and by not producing the DVRs until the day of the hearing the respondent gave the appellant no opportunity to examine whether the respondent had discharged the evidential burden. The judge compounded the problem by effectively saying that the appellant could do nothing to rebut it. The respondent had had two months to produce the DVRs. She had provided no explanation for why they were not sent with the refusal letter or subsequently. It was correct that the appellant, having been informed by paragraph 50 of the decision letter,

that there was DVR evidence, sat on his hands, but he was entitled to because without details of the DVR he could not engage with the process of examining it. (The appellant says that he has still not seen the DVRs, as his solicitors did not show them to him; I make no comment on whether that is the case or not).

5. The appellant's written grounds of appeal also raise a challenge to the judge's handling of the witness evidence. It was contended that the judge incorrectly interpreted and weighed this evidence.
6. Mr Nath's submissions, with reference to the Rule 24 response, made two points in relation to the challenge alleging procedural unfairness: first, that the appellant could not complain about lack of opportunity to address the DVR evidence because he "has always been on notice that the documents he provided were not considered to have been genuine since the refusal of his asylum claim on 21 April 2017 and had almost two months to obtain evidence in rebuttal"; secondly, that the appellant could have sought an adjournment to address this issue but did not. In his submissions amplifying these grounds Mr Nath urged that the grounds be put in context. This was a case where the appellant was relying on documents from 2012 which he had not produced until a five year delay in claiming asylum. The appellant took no steps to request the DVR evidence from the respondent upon receipt of the refusal letter. Further, he came to the hearing seeking to rely on the same documentation he had produced when claiming asylum; he had not sought to produce anything new. Further, the judge cannot be faulted for proceeding with the hearing because the appellant's representative expressly declined to apply for an adjournment.
7. As regards the witness statements, having seen and heard the witnesses, the judge dealt with the witness evidence in some detail and, submitted Mr Nath, it was open to him to find it did not significantly advance the appellant's case.
8. Whilst I have considerable doubts that the appellant will be able to succeed in his appeal, I consider that his two main grounds of appeal contain enough to establish a material error of law in the FtT decision before me. Taken on their own, each ground is not conclusive but taken in combination, they are.
9. Dealing first with the challenge to the witness evidence, it is true that the Upper Tribunal will not lightly interfere with a judge's assessment of witnesses when they have given oral evidence. It is also true that the judge took care to provide reasons why he found the witness evidence not to advance the appellant's case to any significant degree. At 51 - 55 the judge set out his findings on the witnesses as follows:
 - "51. The appellant called a number of witnesses, Mr M C who is a friend from Pakistan who stated that the appellant had told him he is homosexual. He states the appellant is living openly as a gay man in the UK but does not support that statement with any evidence. Under cross examination he said he had never spoken to the appellant about his intentions with regard to staying in the UK or leaving. That I find is a significant given that Mr M C's evidence is that the appellant will be killed if he returned to Pakistan.

52. Mr C H states that the appellant told him about his relationship with H but he says nothing about the appellant's more recent relationship with B. Although they met through a mutual friend Mr C H was entirely unaware when they met that the appellant was gay even asking him if he had plans to marry. I have to ask myself why the mutual friend did not tell him or even why the appellant did not tell him that he was 'living openly as a gay' in the UK.
 53. Mr A K claims he knew B they having been housemates from June 2013 to October 2013. At first in evidence Mr A K gave the impression that he was in regular contact with B. When asked if B knew that he was giving evidence for the appellant today he said that he was rarely in touch with B, that he had very infrequent contact with him.
 54. Mr W K stated that he knew the appellant was homosexual because he had seen him flirting, or dancing with other men. He conceded, however, that he had only known him for a few months and did not know when he came to the UK.
 55. I am not satisfied that any of the witnesses, whose evidence for the most part is based on what the appellant has told them, advanced the appellant's case to any significant degree."
10. The main difficulty with the judge's reasons as set out above is this. Even assuming the judge's reasons for attaching little weight to the evidence of Mr M C, Mr C H and Mr A K are satisfactory, his treatment of the evidence of Mr W K is very problematic. This man was offering direct evidence of having seen the appellant flirting and dancing with other men. The only reason the judge gave for discounting this was that this man had "conceded" that he had only known the appellant for a few weeks and did not know when he came to the UK. This overlooked that this man's evidence was not based on what the appellant had told him and why the relatively short time he had known the appellant (and when he came to the UK) was relevant to his observing of the appellant dancing and flirting with other men at a gay club in September 2016 is entirely unclear. It may have been that what the judge meant to rely on was the fact that this man's evidence, being that of a friend, lacked independence, but that is not one of the reasons he gave.
 11. Turning to the first ground, Mr Nath is right to point out that the appellant had taken no steps to request the DVR evidence in the period of several weeks between receipt of the refusal letter and the date of hearing. However, given that by seeking to rely on this evidence the respondent was alleging deception, it was first and foremost her duty to send the DVR evidence promptly to the appellant. She was not entitled to simply sit on her hands and fail to adduce it until the day of the hearing. Further, the respondent has offered no explanation for why she sat on her hands.

12. By not producing it until the day of the hearing the respondent guaranteed that the appellant would not have a proper opportunity to examine it and respond to it by adducing evidence in rebuttal. The Rule 24 response states that the appellant "had almost two months to obtain any evidence in rebuttal", but this entirely overlooks that without seeing the evidence in question, the appellant was in no position to rebut it. It could be no more than speculation that the appellant would be unable to rebut it.
13. Mr Nath submitted that the judge cannot be said to have erred by refusing to adjourn as no adjournment request was made. However, whether or not an adjournment request was made it remained the duty of the judge to ensure procedural fairness. It should have been patently clear that the appellant had not received the DVR evidence or had an opportunity to address its contents. In any event, whilst it is true that the appellant's representative said she would not pursue an adjournment (having lost on her application for the DVRs to be excluded) the judge, in order to ensure fairness, should at least have considered whether Counsel's reasons carried some weight in the circumstances. What she said in essence was that if the appellant did not proceed before the judge on the day, he could not afford a representative next time and that he would prefer to use the only prospect of representation that he had. The judge's failure to consider the context in which the appellant's representative chose to proceed on the day adds to the picture of proceedings marred by a lack of procedural fairness.
14. I cannot help observing that if paradoxically the respondent had not alleged deception, she would have had a simpler task in terms of the burden of proof in seeking to argue that the FIRs were unreliable. However, by alleging deception, she cannot escape the more difficult task of discharging the evidential burden.
15. For the above reasons I consider that the judge's decision is to be set aside for material error of law. In the nature of the judge's errors, the case will need to be remitted for a de novo hearing before a different FtT Judge. None of the judge's findings can be preserved.
16. It is my understanding from Mr Ahmed that the appellant's representatives now have the DVR evidence and that the appellant is taking active steps to contact the person who sent him the FIRs and to get local lawyers to investigate whether the DVR details are correct. I direct that any rebuttal evidence on which the appellant seeks to rely be submitted to the FtT within six weeks of the sending of my decision.
17. For the above reasons:

The FtT's decision is set aside for material error of law.


The case is remitted to the FtT (not before Judge Lodge). Given the history of this case I would express my hope that it is dealt with by an experienced FtT Judge.

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: 16 May 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a loop at the end of the last name.

Dr H H Storey
Judge of the Upper Tribunal