Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07502/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 November 2018	**On 21 November 2018**

Before

THE HONOURABLE MR JUSTICE TURNER
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR N. B.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr P Jorro, Counsel, instructed by R W Anderson & Co Solicitors

DECISION AND REASONS

This is an appeal by the Secretary of State against a decision of the First-tier Tribunal Judge. The decision under appeal was in respect of an asylum claim of 20 November 2017. The basis of that claim was the fear asserted by the respondent of being persecuted in Pakistan because he is a gay man.

The Secretary of State refused this claim on the basis that the credibility of the respondent was not made out. There is no dispute that he is a citizen of

Pakistan. The central issue therefore as to his sexual orientation. In short summary, his credibility on this issue lay at the centre of his asylum claim.

The First-tier Tribunal Judge analysed the evidence in relation to the sexuality of the respondent and in a detailed reasoned decision concluded that the relatively low threshold had been surmounted. The analysis, however, reveals that in relation to all aspects of the evidence relating to the sexuality of the respondent the Tribunal Judge was deeply and repeatedly sceptical. By way of example only, the evidence relating to photographs of the respondent in the company of, and in physical proximity to, other men were referred to as being "entirely staged".

The judge also said by way of a general comment that his narrative was very hard to accept. There was no appearance on behalf of any witnesses or other contribution from third parties to back up the claim of the respondent. The material therefore upon which the First-tier Tribunal Judge was working would appear, when looked at as a whole, to have mandated a conclusion that effectively his claim to be gay did not get off the ground.

The reason for the conclusion in favour of the respondent, despite all of those adverse issues arising, appears very substantially, if not entirely, based upon an assessment of the medical records. At paragraph 47 of his decision the judge referred to this evidence in the following terms:

> "I come, then, to this rather small entry from the GP's notes, at page 83 in the bundle which, in my assessment, really cannot be overlooked and which needs to be afforded particular weight, given the nature of the appeal. The note from 8 November 2017 refers to 'rectal pain with PR bleeding when wiping first occurred during intercourse one month ago …' The doctor, therefore, has picked up on that matter and it is that specific piece of evidence which, to my mind, really provides the more useful insight into the appellant's sexual orientation."

The paramount significance of that entry in the mind of the First-tier Judge is emphasised by his comment at paragraph 50 of the decision:

> "Despite all the unsatisfactory aspects, therefore, of the appellant's appeal, and the lack of oral evidence from other witnesses on the issue, I am persuaded for the reasons expressed, looking at that medical note, as to the appellant's sexual orientation."

We are unable to escape, therefore, the clear inference that the judge regarded the medical note as the tipping point between what would otherwise have been a rejection of the case that the respondent is gay. It therefore behoves us at this stage to pay particular regard to that medical note in order to determine whether it can rationally support the weight that was given to it by the First-tier Judge. It might also be observed at this stage that of course we are in no worse position than was the First-tier Judge in interpreting this written record.

The GP notes provide on 8 November 2017 that the respondent attended with two complaints. The first, which is irrelevant, related to left shoulder pain. The second complaint is that which was afforded such conspicuous weight by the judge. The extract which was referred to by the judge only partially records what was written by the GP. The full entry provides as follows:

> "Rectal pain with PR bleeding when wiping. First occurred during intercourse one month ago. Straining on going to the toilet. No urinary symptoms.
>
> Examination:
>
> PR: skin tags and external haemorrhoid seen. Unable to assess rectum/prostate properly due to patient distress and tensing.
>
> Diagnosis: haemorrhoid."

When looking at that particular entry it is abundantly clear that the reference to intercourse amounted to nothing more than the GP recording what had been reported to him by the respondent. The fact that he was unable subsequently to assess the rectum properly on the basis that the patient was distressed and tensing underlined the fact that the GP was expressing no conclusion that the reference to intercourse was causatively relevant to what he found on examination. Indeed, straining on going to the toilet is, as common knowledge would suggest, in itself a common cause of haemorrhoids.

We are in no doubt that the judge treated this entry with an irrational reverence in terms of the implications of what it recorded and the judge's emphasis upon this can only be explained by a misapprehension as to what was actually recorded or, at least, the importance of that. When the judge said the doctor has picked up on that matter the reality is that this was simply a record of what he had been told by the respondent and, significantly, told at a time when the sexuality of the respondent was already in issue against the background of the asylum claim. Bearing in mind also that at the time of this record on the respondent's own account he had been engaged in anal sex for a very considerable period, then his observation that the bleeding first occurred during intercourse is somewhat diluted in terms of its significance in timing.

So, for those reasons, despite the fact that this is a decision on the facts and reminding ourselves as to the restraint we ought to exercise in interfering with that, we remain in no doubt that this is a case in which the decision of the judge was indeed irrational to the extent that it amounted to an error of law. However, this is a case in which, clearly, the balancing exercise, once that observations have been taken into account, falls to be exercised again and therefore we allow this appeal but order that the matter should be reheard before another First-tier Tribunal Judge, not the one who was the author of this decision.

Notice of Decision

The appeal is allowed.

The matter should be reheard before another First-tier Tribunal Judge and not the one who was the author of this decision.

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 Mark Turner Date 13 November 2018

Mr Justice Turner

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed Mark Turner Date 13 November 2018

Mr Justice Turner