



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07790/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 3 April 2018

Decision and Reasons promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MR
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Head of Lupins (Olympic Way) Solicitors.

For the Respondent: Mr Mills Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Malcolm ('the Judge') promulgated on 11 October 2017 in which the Judge dismissed the appellant's appeal on asylum and humanitarian protection grounds. The Judge noted that there were no submissions the claim was to be considered on human rights grounds and that an application previously

submitted under Article 8 ECHR had been considered and rejected by the respondent.

Background

2. The appellant, a citizen of Pakistan, was born on [] 1971. The appellant's immigration history shows that on 2 June 2006 he was granted a family visit Visa with which he arrived in the United Kingdom on 20 June 2006. On 23 July 2012 the appellant submitted a human rights application which was rejected on 31 October 2012. On 31 May 2017 the appellant was encountered by police and arrested on suspicion of being an illegal entrant. The appellant was detained and served with forms RED0001 and RED0003. On 22 June 2017 the appellant claimed asylum. After the screening, induction, and asylum interview process, including further representations received on 24 July 2017, the protection claim was refused. The date of that decision is 1 August 2017.
3. The Judge notes a preliminary issue that arose at the commencement of the hearing at [12 - 14] of the decision under challenge in the following terms:
 - “12. At the outset of the hearing the appellant's representative requested an adjournment to obtain a medical expert report given that the respondent does not accept that the appellant had been subjected to mistreatment due to his sexuality. Also the appellants agents wish to obtain a report as the appellant's account has not been accepted and as the appellant has problems with his memory. It was submitted that the report to be obtained would deal with the symptoms of the mistreatment claimed by the appellant and his claim that he has had memory recall issues due to mental health problems and that he is also suffering from insomnia. There was also an issue with the original of documents to be provided.
 13. Mr Sartorius pointed out that at no other time has there been any issue raised with the appellants memory other than as detailed in paragraph 34 of his statement, this was not raised at either the asylum interview or screening interview.
 14. Having considered the information and evidence available and the submission made in support of the request for adjournment I was satisfied that it was not appropriate to adjourn the hearing.”
4. The Judge records that the appellant was present and gave his evidence with the assistance of an interpreter and summarises the appellant's case from [16 - 54] of the decision under challenge.
5. The Judge refers to the evidence of two witnesses and submissions made by the advocates before setting out findings of fact between [100 - 133] of the decision.
6. The Judge notes the appellant's identity and nationality are not in dispute and that the appeal hinges on the credibility of the appellant [102].
7. The core of the appellants claim is a risk on return to Pakistan as a gay man. The Judge notes that this issue was not previously raised by the appellant prior to the asylum claim [104]. The Judge found the failure to claim asylum at an earlier date

damaging to the appellant's credibility [106] and noted the appellant only claimed asylum following his arrest.

8. The Judge notes the appellant came to the United Kingdom on a six-month visit Visa and has remained unlawfully once the visa expired. Between [114 - 131] the Judge makes the following findings:

- "114. Perhaps more significantly however it is a core part of the appellants evidence that he was involved in a homosexual relationship with a teacher at his school (when he was aged 12) but the letter from Muhammed Hafeez (I understand was a teacher at the same school) makes no mention of this.
115. In relation to the letters provided there is also a letter (at Page A19 of the appellants bundle) stamped "police station Gujrenwala" which is in almost identical terms to the letter from Azra Sabir Khan. Given the Authorities position on homosexuality in Pakistan it seemed somewhat unusual that a letter would be provided from a police station including the phrase "but we accept it as his legal human right to select his own choice of sexual life" (as highlighted by Mr Sartorius).
116. As detailed the fact that the letter from the police station and from Azra Sabir Khan are in almost identical terms leads me to the conclusion that the authors of the letters have been provided with the content to be written in the letters.
117. Whilst I accept that the letters could be regarded to be of some value in support of the appellants claim I am of the view that they are of limited value.
118. The appellant has given a detailed account of the problems which he encountered in Pakistan and the abuse which he suffered.
119. I accept the submission by the appellant's representative of the difficulties in assessing the evidence given by the appellant of incidents which occurred when he was 12 years old and whilst accepting that the appellant has given a detailed account I found it difficult to accept that the appellant having reported the assault on him by his teacher would then find himself in this situation where he would be compelled to engage in sexual relations with the police officer to whom the report was made. I simply did not find this evidence to be credible.
120. In dealing with the evidence as to the appellants life in Pakistan the appellant has given evidence that he is in contact with friends in Pakistan and in his evidence a friend and a cousin in Pakistan obtained the letters for him from Muhammed Hafeez and Azra Sabir Khan. I have to question why the appellant has not provided statements from either of these parties in Pakistan who it is to be assumed could have given detailed statements as to the problems which the appellant experienced in Pakistan.
121. I find that the lack of evidence from witnesses who could speak to the problems which he experienced in Pakistan to be damaging to the appellant's credibility.

122. In relation to the appellants life in the UK he has lived in Birmingham for a number of years. It was his evidence that he has been involved in numerous liaisons and in one or two on/off relationships and is also involved in a current relationship. The appellant gave evidence that his current partner Fawad suffers from epilepsy and that he did not wish his partner to give evidence on his behalf less it was a danger to him but that his partner would have given evidence if the appellant had insisted. This was at odds with the information in the statement from the caseworker where it is stated that whilst Fawad Charyini confirmed to the caseworker that he was gay and was in a sexual relationship with the appellant he was unwilling to be a witness in the appeal.
123. Two witnesses did attend court on behalf of the appellant, Mr Chohan spoke to his belief that the appellant was gay due to his behaviour. I accept the submission by Mr Sartorius that the incidents referred to by Mr Chohan were not at all determinative of the appellants sexuality.
124. Both witnesses spoke to the appellant having advised both of them that he was homosexual. This however I consider is of little evidential value as it does not provide corroboration but is simply reporting information provided by the appellant.
125. In addition the second witness, Mr Tasleem also gave evidence that the appellant had sought his advice on dating sites. This I considered was somewhat unusual given that the appellant had lived in Birmingham for some 11 years and had given evidence of his involvement in the gay community.
126. Again I accordingly considered that the evidence of both witnesses was of little assistance to the appellant's case.
127. There were no other witnesses who gave evidence in support of the appellants claims nor was there any other documentary evidence (for example photographs or text or WhatsApp conversations). Whilst I accept that it is clearly not necessary for an appellant to provide such documentary evidence I considered that the appellant could however have provided statements from other witnesses which would have supported his claim.
128. In respect of the Rule 35 report it was noted in the examination the appellant had no scars but described headaches and symptoms of depression/insomnia. It was the opinion of the doctor that the symptoms may be linked to the history, as described (being the incident when he was attacked by 10 family members in Pakistan). The report is an assessment based on the information provided by the appellant but goes no further than that and again I consider does not assist as corroboration of the appellants claim of having been attacked in the manner described by him.
129. In addition as at February 2017 the appellant was convicted of a sexual assault. It was explained in evidence that he was accused of inappropriate touching of a woman sitting next to him on a bus, having

touched her leg. He pled guilty on advice but denied that he had done anything wrong.

130. If the appellant is homosexual as claimed I consider that the appellant's conviction for an offence of this nature is somewhat at odds with his claim sexuality and albeit I note that the appellant denies that he behaved in this way he did plead guilty to the charge.

131. Accordingly taking an overall view of the evidence and whilst applying the lower standard of proof I am not satisfied that the appellant is homosexual as claimed by him."

9. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal on 4 January 2018. The operative part of the Upper Tribunal grant of permission being in the following terms:

"In relation to the challenge to the decision of the Judge of the First-tier Tribunal Malcolm to refuse to adjourn the hearing, the Court of Appeal held in its recent judgment in KM (ALGERIA) v SSHD (McCombe LJ, Moylan LJ) 26/10/2017, *ex tempore*) that the Tribunal is to be assumed to have had the overriding interest in mind even though it was not referred to in terms in the decision. Nevertheless, I will not refuse permission on this ground.

I grant permission primarily because I consider that paragraphs 8 - 11 of the renewed grounds are arguable, i.e. it is arguable that the Judge may have erred by speculatively assuming that Muhammed Hafeez had knowledge of the alleged abuse (as contended at paragraph 9 of the renewed grounds) and she may have erred by failing to take into account, in assessing the credibility of the appellants evidence about his experiences in school in Pakistan, that he was a child (as contended at paragraph 11 of the renewed grounds).

All the grounds may be argued."

10. The Secretary State opposes the appeal in a Rule 24 response dated 2 February 2018.

Submissions

11. On behalf of the appellant Ms Head submitted that the Upper Tribunal judge granting permission had not refused permission to challenge the decision of the Judge to refuse the adjournment but that she accepted the principle referred to in the grant of permission. It was submitted that the issue was that of fairness which it was submitted the Judge had not considered.
12. It was submitted the appellant was detained and so did not have much time to pursue evidence such as medical evidence. A letter dated 13 September 2017 demonstrated that an expert had been found and provided details of the appropriate timescale. It was submitted this is an issue raised in the refusal letter.
13. Ms Head submitted this is a publicly funded case and that the grant of a legal aid certificate was required to enable an expert to be instructed. It was submitted that although it was limited evidence, there was evidence before the First-tier Tribunal highlighting the problems in the matters raised. It was submitted the Judge (i) did

- not consider the correct test as to whether an adjournment was required and (ii) did not give adequate reasons for why the adjournment request was refused.
14. In relation to other grounds; Ms Head submitted the Judge failed to give proper weight to the appellants evidence. The Judge recognised that the matter hinged on the appellant's credibility which it was submitted was why the adjournment request was made and the medical evidence required.
 15. It was submitted the Judge failed to consider the evidence with the required degree of anxious scrutiny and had not considered what the doctor had actually said in the material that was available. It was submitted the Judge should have considered matters in greater detail.
 16. Ms Head submitted the finding at [117] was wrong as the Judge failed to give appropriate weight to the letters. It was submitted the Judge has erred as although it is accepted the teacher would know the relationship at the school the appellant at that time was a vulnerable child and there was no evidence that Muhammed Hafeez was aware of what had happened to the appellant. It was submitted the Judge's findings are not sustainable in relation to this aspect.
 17. It is further submitted the Judge failed to consider the appellants claim to have been abused at school by a teacher in its context and that the Judge had speculated at [114] in a manner not supported by the evidence.
 18. In relation to the findings concerning the police officer at [119]; it was submitted the Judge had background material and the context of the same should have been considered by the Judge.
 19. The Judge also had evidence dated 2017 from a group in the UK who assisted those in LGBT groups in relation to housing and other problems which, together with evidence in the background material, assisted the appellant.
 20. It was submitted the fact the appellant was a vulnerable person meant the teacher could lead him as could the police officer.
 21. In relation to the witnesses in court; Ms Head submitted the finding at [123] was indicative that the Judge had not assessed the evidence to the required lower standard. It was submitted that [126] has been determined by an application of the wrong test with the judge only looking at half the evidence and not all the evidence given. It is submitted the Judge has ignored other aspects of the evidence. At [125] it was submitted the Judge had found the evidence 'strange'. It was also submitted a statement from the appellant's solicitor had not been mentioned by the Judge. It was argued the Judge had not considered the same at all, as with other aspects of the evidence, which was relevant as it tied in with what Mr Tasleem had said. It was submitted that a witness lived in the same house and the Judge could not ignore the evidence. The appellant also submits that the finding at [131] is unsustainable.
 22. On behalf of the Secretary of State Mr Mills submitted that although he was unable to trace the case of KM (Algeria) the general principle was accepted that it can be inferred that the Judge was aware of the overriding interest. It is argued that although the consideration was brief the Judge noted the application being made and gives adequate reasons. This matter arose at the outset of the case and the Judge records the first indication of medical issues was in the appellant's statement which had not been raised before. It was argued the Judge was entitled

- to say no effort had been made to obtain the evidence previously and to refuse the adjournment request as it had not been made out that it would realistically achieve anything. Mr Mills submitted the Judge was aware of all the issues in the evidence and submissions made, including the potential for medical evidence.
23. Mr Mills submitted a Rule 35 report was available in the bundle. The Judge finds the report is based upon no more than the appellant's own view of what happened to him which is all the doctor who wrote to report records. It is argued the Judge is factually correct to make such finding. The Rule 35 report is in accordance with the rules of the detention centre in relation to the preparation of such a document but it was submitted is of no evidential value in the appeal and that the refusal of the adjournment is lawful and appropriate.
 24. In relation to the other grounds; it was submitted the challenge to the weight given to the evidence by the Judge has no arguable merit. The assertion the Judge ignored the solicitor's statement has no merit as the Judge states she considered all the evidence and factored the same into the decision-making process.
 25. It is submitted the Judge gave reasons such as at [118] for findings in relation to documentary evidence. In relation to [115] the Judge correctly recognises that although one letter has been provided from the police station it is known people do not go to the police for protection in Pakistan as they will not get the same. The content of the letter from the police station in light of the country material and attitude of the police in Pakistan is arguably 'unusual'.
 26. The Judge explains why such documentation was not reliable.
 27. The Judge considers the evidence of the witness and gives reasons why he doubted the evidence of one of the witness and had not put weight on the evidence of the other. It was of note that the second witness only repeated what the appellant told him. The Judge noted the appellant claimed that his partner had not turned up to give evidence but did not feel able to give weight to that evidence for the reasons set out in the decision under challenge.
 28. In relation to the issues concerning the teacher; Mr Mills submitted the grounds make the point that it was appropriate to refer to what referred to as a homosexual relationship and submits no arguable legal error is made out as this is how the appellant describes the same in his evidence. The appellant's case is that it was only when he was beaten by the teacher that he went to the police and that the appellant described what had occurred as a relationship rather than as abuse.
 29. Mr Mills submitted the appellant is not a child now. The teachers letter refers to the appellant being bullied at school, written by the current head of the school the appellant attended. Mr Mills submitted the author seems to be aware of the appellants claim as if it was known at the school and that this evidence taken together enable the Judge to make the finding recorded in the decision under challenge. Mr Mills submitted the findings are adequate and fair.
 30. In reply, Ms Head submitted the appellant had only two months to deal with the adjournment request but the Judge gives no reasons for refusing the adjournment. It was submitted that it was not open to the Judge to 'infer' in this case and that the wrong standard of proof had been applied. A matter can be 'unusual' but still credible. It was submitted there were no clear findings as to whether the witnesses were credible and that the reference to 'unusual' shows that the wrong test was

being applied by the Judge who did not determine the appeal by reference to the correct test.

31. Ms Head submitted the appellant was a child and that the relationship with the teacher was inappropriate sexually in the context of the appellant being a child which it was submitted demonstrates the inability of the Judge to consider the case adequately. It was submitted the Judge's suggestion there was a relationship was not open to the Judge on the facts.

Error of law

32. It is not the role of an expert to decide whether a person is credible or not. The Secretary of State refused the appellants asylum claim in a decision made on 1 August 2017. It was therefore known that credibility was in issue.
33. Although the appellant sought an adjournment to enable reports to be prepared it has not been made out before the Upper Tribunal today that the outcome of the case depended largely on the contents of any such reports.
34. In *Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)* it was held the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?
35. The Judge noted that some medical evidence had been provided and that the appellant was able to give evidence in chief and to face cross examination as were those witnesses who were called. The Judge arguably had sufficient material available to enable the appellant's credibility to be assessed. It has not been made out that the appellant was denied a fair hearing by the decision of the First-tier Tribunal.
36. The Judge clearly considered the evidence with the required degree of anxious scrutiny and gives adequate reasons in support of the findings made. As such the weight to be given to the evidence was a matter for the Judge. Challenges in the submissions made on the appellant's behalf to the weight have no arguable merit as it is not established that the weight given was irrational or contrary to the evidence, when considered as a whole.
37. The Judge considered the country material and the finding in relation to the letters and the similarity of content of letters from different sources undermining the weight to be given to such evidence was within the range of findings reasonably open to the Judge.
38. The point as to whether there was a relationship does not take the matter further. If the appellant was abused by a teacher this does not infer a consensual relationship. The issue the Judge was required to make findings upon was not, however, what had occurred in the past but to consider the core question which is whether the appellant is gay and whether as a result of his sexual identity he will face a real risk on return to Pakistan. The order of questions to be considered is clearly set out by the Supreme Court in *HJ (Iran)* as noted by the Judge. The finding is that the appellant fell at the first stage of the test.

39. Although it is submitted the Judge applied the wrong test this is not arguably made out. Whilst Ms Head challenges some of the wording used on occasions by the Judge the Judge sets out the correct legal self-direction at [5 - 10] of the decision under challenge. It is not made out that the Judge, having set out the correct legal self-direction and referring to the lower standard, then applied a different standard which was not permitted when the determination is read as a whole.
40. The Judge noted conflicts in the appellants evidence in relation to his alleged partner in the United Kingdom and whether that person was willing to be a witness or not and the fact the evidence from one witness was only repeating information that he had been given by the appellant. It was therefore not a matter within that person's own personal knowledge or experience separate from the appellant.
41. The Judge was entitled at [125] to express surprise described as the evidence been "somewhat unusual" that the appellant had asked one of his witness for advice on dating sites when it was the appellant's own evidence that he had lived in Birmingham for some 11 years and given evidence of his involvement in the gay community. The Judge is clearly inferring that if the appellant had been involved in the gay community this information may have been already known to him.
42. The Rule 35 report was taken into account by the Judge who again noted it was based upon information provided by the appellant.
43. The Judge makes an arguably sustainable observation in relation to the appellant's conviction for the sexual assault on a female at [129] and [130] that the fact he wished to touch a female on her leg, in a manner that warranted criminal charges for a sexual offence where the necessary intent is relevant, was at odds with his claim sexuality as a gay man.
44. It is always problematic in any appeal based upon a person's beliefs or preferences for a decision-maker to look into a person's heart or mind. For that reason, a judge is required to assess the evidence they are given and to balance the same cumulatively to test whether it is internally consistent, and against country and other material to check whether it is externally consistent. This is the exercise the Judge undertook in this appeal. The burden of proof remained upon the appellant to establish that what he was saying was true. The finding of the Judge is that the appellant failed to discharge this burden to prove he is a gay man as he claimed.
45. As stated, the Judge clearly considered the evidence with the required degree of anxious scrutiny and it is not made out the Judge failed to consider all the evidence. The Judge specifically refers to such evidence being considered. The Judge is not required to make findings on every aspect of the evidence or to set out in the determination what he or she thinks about all the material relied upon. The requirement is for that evidence to be taken into account as part of the decision-making process and for the Judge to give adequate reasons to enable a person reading the decision to understand firstly the conclusion reached and secondly the reasons for such conclusion. It is not made out the Judge has erred in law in the manner in which the appeal was approached or the conclusions reached.

46. It is my finding that the Judge’s decision has not been shown not to be within the range of conclusions reasonably open to the Judge on the evidence such as to amount to an error of law material to the decision to dismiss the appeal. The appellant has failed to establish any arguable basis warranting the Upper Tribunal interfering in this decision. Disagreement with the outcome or desire for a more favourable result does not establish arguable material legal error per se.

Decision

- 47. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

48. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 17 May 2018