Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05100/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 March 2019	**On 16 May 2019**

Before

THE HONOURABLE MRS JUSTICE JEFFORD
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CRAIG

Between

MR HASSAN JAVAID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Z Harper, Counsel, instructed by Wimbledon Solicitors (Merton Rd)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant in this case is a national of Pakistan who was born on 11 September 1990. He arrived in the UK by plane from Pakistan in or around July 2013, having been issued with a visit visa in Islamabad which was valid until 1 January 2014. It appears that on his Visa Application Form he claimed that he wanted to visit the UK for a holiday for one month, that he was married and his wife was not travelling with him, that he was employed as an engineer on a monthly salary of 74,000 rupees, which were evidenced by salary slips, that he

had evidence of savings of 959,000 rupees and owned property, and he gave his address as in Lahore.

It is the appellant's case now that in fact almost all of this is untrue, that he had never worked, which means of course that his salary slips which were provided must have been false documents, that he had not been an engineer but was a student in Pakistan at the time and that his visit visa had been arranged by an agent, the application for which had contained false information. He subsequently made a number of further applications to be allowed to remain on the basis of his family and private life in this country, which it is not necessary to set out in detail in this decision.

The applicant has made at least five previous applications and it appears other submissions may have been made as well. In what was at least his fifth private and family life application, which was submitted on his behalf by a firm of solicitors and which was received by the respondent on 4 December 2017, the application re-asserted that the appellant had a firm grasp of English and also (even though this was clearly untrue) that he had "spent vital years of his life as a minor" in this country.

The following claim was made regarding what were said to be the appellant's family connections in the UK, which was consistent with his claim that he was supported by family and friends:

> "Furthermore, we submit that our client has lost his cultural ties in Pakistan; our client speaks English and has accustomed to the British way of life. Given his time in the UK he has established close relations here, who include his family and friends who have become his strong family and social ties".

All of these applications as I have stated were refused, the last application being refused on 24 January 2018, the respondent in that decision deciding that there were no significantly different factors from those which had been considered before which could constitute a fresh claim (which would have entitled the respondent to refuse to entertain these submissions as a fresh claim pursuant to paragraph 353 of the Immigration Rules) but in any event, in light of all the previous immigration history, the Article 8 claim was certified as clearly unfounded under Section 94 of the Nationality, Immigration and Asylum Act 2002, the effect being that the appellant could not appeal this decision until after he had left the UK.

The appellant did not leave following this decision but was apparently encountered in the course of an enforcement visit by agents of the respondent to the White House Express Restaurant, at 102 Golders Green Road, London NW11, and he was detained. Whilst in detention, on 22 February 2018, he claimed asylum. The basis of his asylum claim is that the real reason he left Pakistan in 2013 had been that he had been attacked physically by his family because he was a gay man and his family did not approve of his sexuality and so he had arranged with an agent to escape to this country, where, in the

subsequent answers he gave, it appeared to be his case that gay people are not persecuted.

The respondent refused to grant him asylum and he appealed against this decision to the First-tier Tribunal. Eventually, his claim was heard at Harmondsworth on 26 July 2018 before First-tier Tribunal Judge Raymond. In a Decision and Reasons amounting to 35 pages and 238 paragraphs Judge Raymond dismissed his appeal. He now appeals to this Tribunal pursuant to leave granted by Upper Tribunal Judge Grubb on 21 January 2019.

There are essentially two grounds of appeal. The first is that there was procedural unfairness, the unfairness being that the judge failed to attach appropriate weight to the fact that, for reasons which I will deal with below, the appellant, who would have wished to give his oral evidence with the assistance of an interpreter, gave his oral evidence in English without that assistance. It is argued that the proper course for the judge to take would have been either to adjourn the proceedings until another date when an interpreter could be available or, alternatively, to have ensured that the evidence of the appellant was treated with extreme caution before the judge made any findings based on any apparent inconsistencies arising out of that evidence.

The second ground was that the judge had failed properly to appreciate, as apparent from Home Office guidance and also from European case law in the case of *A, B, C* [2014] EUECJ C-148/13 that he should not place any reliance upon a delay in making a claim based on the sexuality of an applicant and furthermore should be very cautious before relying upon arguments which in effect are stereotypical.

The Decision

Ground 1 - Procedural Unfairness

The way in which this argument is now advanced is reliant upon a witness statement which has been made subsequently by Counsel who represented the appellant before the First-tier Tribunal, to which he has exhibited his notes of the hearing. Although the judge has not been invited himself to comment on the version given by the appellant's Counsel we will deal with this appeal on the basis that it is at least arguable that it is an accurate version of what occurred.

It is unfortunate that Counsel who settled this witness statement also saw fit to sign the grounds because as he was a potential witness there was an inherent conflict in so doing. However, the appellant is at this hearing represented by Ms Harper, and so nothing really turns upon that now because she is clearly not conflicted.

What apparently happened in the hearing was that although at the outset the appellant was assisted by a court-appointed Urdu-speaking interpreter it quickly became apparent that he lacked sufficient competence to translate properly. Apparently, it was the appellant himself who pointed this out

because he was aware that the translations were not accurate in certain respects. As the appellant's Counsel put it at paragraph 5 of his witness statement, it became apparent "both from my own general observations and after taking the appellant's instructions, first, that the interpreter was not faithfully translating what the appellant was saying in evidence and, second, that the general level of the interpreter's English was simply inadequate for the task he had been appointed to perform".

I set out the following three paragraphs in Counsel's witness statement, as follows:

> "6. I raised these concerns with the judge and a short discussion ensued. In this discussion, I canvassed the issue of fairness and the possible need to adjourn for the Tribunal to find an alternative interpreter. I agreed with the judge's assessment that the appellant's level of English was relatively good (indeed he had alerted me to the issue of inadequate translation) and invited the judge's views on whether he considered it fair to proceed.
>
> 7. The judge indicated that, if we were content to proceed in English with the assistance of the interpreter if required, he was minded to continue.
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> 8. Upon taking instructions, the client stated that, although far from ideal, he was content to proceed in English. I related my instructions to the judge".

Counsel then continued as follows:

> "9. I then specifically asked the judge, if we were to proceed in English, to direct himself appropriately to these issues when considering the weight to attach to any criticisms he might subsequently make of the appellant's oral evidence, particularly given the nature of the appellant's claim, based as it was on his sexuality and the relevant issues of his coming to the realisation that he is gay and any delay in so doing. The judge stated explicitly that he would do so".

The hearing then proceeded in English and all the remaining questions were answered in English. In the closing paragraph of his statement, Counsel concluded as follows:

> "11. In my closing submissions, I reminded the judge of the need to direct himself appropriately and to approach the appellant's oral evidence with particular caution given the procedural issues which had arisen during the hearing".

Complaint is now made that the judge did not include within his 35 page and 238 paragraph decision one or two lines to the effect that "I remind myself that I must remember that the appellant gave his evidence in English, which is not

his first language". In her skeleton argument produced for this hearing, Ms Harper then referred, at paragraph 16, to occasions within the judge's decision in which it might be said that the judge had been influenced by inconsistencies or other imperfections within the appellant's oral evidence. She puts the case quite highly at paragraph 16 as follows:

> "In this case, considerable reliance was placed on A's explanations in oral evidence, which were found to be evasive, wanting detail, or otherwise inadequate".

Ms Harper gives five examples. At paragraph 166, when considering the information which had been given by the appellant (in his case by the agent he employed) in his entry clearance application (which, it is now accepted, was almost wholly false), at paragraph 166, Judge Raymond described the appellant's oral evidence on this issue as "evasive, ambivalent and implausible". Complaint is made that the judge had then gone on to find that "from the outset the appellant has adopted lies as part of his immigration history" (this is at paragraph 172).

The next example given is that the judge had found that "there is no credible explanation" (at paragraph 175) for the appellant apparently failing to realise that he could live openly in the UK as a gay man (which on the appellant's case as advanced now he did not appreciate until he was arrested and detained in February 2018). Complaint is also made as to the judge's criticism of the appellant's contention that he did not himself know about asylum as an option (at paragraph 176) before ultimately concluding at paragraph 208 that the appellant "has failed to provide any credible explanation for why he did not seize these multiple opportunities to bring his fear of being persecuted in Pakistan because he was gay to the respondent".

It is not entirely clear how it is said that this observation arose out of any difficulties that the appellant may have made in expressing himself in English.

Then it is suggested that the judge was wrong when dealing with the contact the appellant had with his family to describe this as "a further example of the obscurity and confusion that the appellant creates around his asylum narrative" (at paragraph 204) and it is said (again, criticising the judge) that he "further relies at [paragraph 205] on apparent contradictions in the appellant's oral evidence regarding contact with his brother".

Complaint is made that the judge had relied at paragraph 217 upon the fact that the appellant had given "contradictory and evasive answers" as to why he chose to go to NAZ in May 2018 (at paragraph 217).

Finally, a point was made that when the judge was giving consideration to the appellant's claim to have been "raped" by his maths teacher (at paragraphs 142 to 148 of the decision) reliance was placed upon the appellant's use of the word "rape" as being discrepant with "forced touching".

It is said in reliance on these five examples that the judge's approach was procedurally unfair.

Ground 2 – Failure to apply relevant Case Law and Guidance

Within the ground itself this claim is advanced on the basis essentially that the judge had been wrong to place reliance upon the appellant's delay due to reticence in disclosing intimate aspects of his personal life. In this regard, the appellant relies, as already stated, upon the European decision in *A, B, C* and also on what is said in the Home Office guidance.

In oral argument, this ground was expanded to include a complaint that the judge had been wrong to rely on stereotypes as to what people might be expected to know. In particular, it is argued that somebody of this appellant's cultural background who had stated that he continued to go to the mosque in this country would understand what was commonplace in London in the same way as a British person would do.

Discussion

I deal first with whether or not it can properly be argued that the hearing before Judge Raymond was procedurally unfair. In our view, this argument is not a tenable one. The appellant was represented at the hearing by Counsel, whose responsibility was not only to advise him as to whether or not he should apply for an adjournment (which he did not) but also to ensure that the proceedings themselves were conducted in a fair manner. To this end, the appellant having decided that although he would prefer, ideally, to have the assistance of an interpreter who could actually speak both Urdu and English sufficient to do the job he was paid to do, nonetheless he would rather have the hearing continue than be obliged to adjourn until another day. Counsel asked the judge to agree that he would always have in his mind when considering what weight to attach to such criticisms that might be made arising out of the appellant's evidence that he had been giving his evidence in a language which was not his first language, and as Counsel states in terms within his statement, "the judge stated explicitly that he would do so". Counsel also reminded the judge of the need to direct himself appropriately when making his closing submissions and the judge did not disagree when so reminded. So, it cannot realistically be argued with any force that the judge was not wholly aware of the difficulties that might have arisen because of the lack of an interpreter or that he should not jump to any conclusions which might be as a result of linguistic difficulties.

The real weakness of this submission, moreover, is that there does not appear to have been a single instance during the cross-examination of the appellant where it is suggested that the appellant's answers were in any way inhibited because his English was not sufficient to understand what he was being asked or to express properly what he wished to say. Not only did the judge not record anywhere that such a problem had arisen, which he would have been obliged to do, but Counsel specifically himself did not refer to any such difficulty. Neither in his note of the hearing which was attached to his

statement (although not seen by this Tribunal until the hearing because it was not included in the file) or in his statement did Counsel suggest that such difficulty had arisen. Indeed, Counsel had specifically recorded the cautionary words repeated in his closing submissions to the need for the judge always to have in mind the linguistic difficulties which might arise but without setting out any specific examples which he wished the judge to have in mind when considering what findings to make. This was a case where clearly there were bound to be credibility issues because, on the appellant's own case, he had told a number of lies within his past applications and had put forward inconsistent accounts.

In a sense, the argument that is now advanced on behalf of the appellant (and I say this without any criticism of Ms Harper, who has advanced it properly) is a very unattractive argument. It in effect amounts to what could be called a win-win situation for applicants in general because on the one hand, if no adverse points are taken against an appellant because of a lack of interpreter, it would put that appellant at an advantage because it would in effect inhibit the judge in making findings that otherwise would seem to follow naturally from the evidence. But on the other hand, if an appeal were now to be allowed upon this basis, it would mean that where adverse credibility points were taken, that would in itself provide a ground of appeal.

This Tribunal has been referred to the decision of the Court of Appeal in *Perera (Jude) v SSHD* [2004] EWCA Civ 1002, which case concerned an appeal by an applicant who claimed that the interpreter provided had not had adequate skill to do the job properly. At paragraph 34, Judge LJ had stated as follows:

> "34. When a responsible legal representative expresses some dissatisfaction about the quality of the interpretation and the skills of the interpreter, that plainly gives rise to a concern which the court, or in this instance the Adjudicator, should immediately address. That is what this Adjudicator did. The responsibility for deciding whether or not the proceedings should continue with the existing interpreter, or whether the interpreter should be discharged and the proceedings restarted, falls not on the legal representatives, but on the Adjudicator. For the reasons given by Pill LJ, I agree that no sufficient basis for impugning the quality of the interpretation in the present proceedings has been shown, and there is nothing which suggests that the outcome of the proceedings from the appellant's point of view was adversely affected by inadequate or unskilled interpretation".

In this case, the concern was addressed and the reason why the case was not adjourned and the proceedings went ahead was precisely because, having been advised by Counsel, the appellant chose to proceed and give his evidence in English. The judge agreed at the outset that he would make due allowance to the fact that the appellant was giving his evidence in what was not his first language and was reminded of this in closing submissions. It is, in our view, fanciful to suggest that merely because the judge did not record within the

decision itself that he was doing what he had been asked and he had agreed to do and had been reminded to do, it followed that he did not.

We also consider it is appropriate to record that it is quite clear from this decision that it was not founded simply on linguistic difficulties which had arisen during the course of the hearing. This appellant had made a number of attempts to obtain permission to remain in the course of which he came out with various inconsistent accounts. This latest application relied upon yet another inconsistent account. The judge was entitled to have in mind when considering whether, even to the lower standard of proof, the appellant had satisfied him that his sexuality was as now claimed, that he now claimed that he had told a number of people within this country from very early on in his stay what his sexual orientation was (which of course does not mean that he was bound to tell anybody) and, upon his own account, he came to this country because effectively, as he is saying now, he was persecuted in Pakistan (by his family) because he was gay whereas the situation in this country was different. Yet while claiming to be unaware that he could live openly as a gay person in this country (which was one of the reasons given for not claiming asylum earlier on this ground) and not being aware of this until he was detained in 2018 he also states that in 2017 he had seen two gay men kissing in Walthamstow. These are all points to which the judge had had regard. He also considered that it was inconceivable that a person living openly in this country since 2014 would not have had at least some exposure to social media in a country in which gay marriage has been lawful for some years and civil partnerships between people of the same sex even longer. The judge was entitled to conclude on the evidence before him that the position of gay people in this country was not treated with the same revulsion as the appellant now claims he feared it was and would be were he to return to Pakistan. The judge also was entitled to have regard to the appellant's failure not just to claim asylum earlier (which, it is his case now, was partly because he did not want to do so because he did not want to disclose his sexuality to his Muslim friends) but also supposedly for the reason that he did not know that he could claim asylum until 2018. The judge's finding that that is simply inconceivable, especially given that amongst his friends was apparently someone who had him or herself claimed asylum for this reason, was a sustainable one.

So far as the second ground is concerned, this is also unarguable. Its reliance on the European case of *A, B, C* is misplaced. In that case, at paragraph 69, the court found (in translation):

> "69. However, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility *simply* [our emphasis] because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset."

At paragraph 71, the following is stated:

> "71. Thus, to hold that an applicant for asylum is not credible, *merely* [our emphasis] because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph."

In our judgment, the inclusion of the words "simply" and "merely" is important. What the court was saying, and this is consistent with the guidance given by the Home Office now, is that a decision maker has to be sensitive to the natural reticence that people have to be public about their sexual orientation and that a decision should not be taken "simply" or "merely" because of such reticence. However, as is clear from the extremely detailed and thorough decision made by Judge Raymond, that was far from the position here.

Similarly, the judge does not stereotype the appellant in any way. He does not compare him to in particular gay people or any other class of society. What he was saying was that, considering the evidence in the round, it was a factor which was to be weighed against the appellant that he was saying that he did not until 2018 appreciate that a person could live openly as a gay person in the UK, which was contrary to the general experience of anybody living in this country as well as being contrary to specific parts of the appellant's case, not just what was said in oral evidence at the hearing but also in other applications and in written statements.

In our judgment, the grounds are unarguable and there was no material error in Judge Raymond's decision. It follows that this appeal must be dismissed, and we so find.

Decision

There being no material error of law in First-tier Tribunal Judge Raymond's decision, this appeal is dismissed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 13 May 2019