Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07425/2019

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 10 November 2020 *via Skype for Business*	**On 19 November 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

BR (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Z. McCullum, Counsel, instructed by the Joint Council for the Welfare of Immigrants
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.

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The documents that I was referred to are the trial bundle from the First-tier Tribunal, the decision of the First-tier Tribunal, and the grounds of appeal, 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 hearing was conducted fairly in its remote form.

1. The appellant, BR, is a citizen of Pakistan born in 1989. He claims to be a gay man who will face being persecuted in Pakistan on account of his sexual orientation if he is forced to return there. He made an asylum claim to the Secretary of State on that basis. The Secretary of State refused the claim on 24 July 2019. He appealed to the First-tier Tribunal, and his appeal was heard by Tribunal Judge Hussain who, in a decision promulgated on 9 April 2020, dismissed the appeal. The appellant now appeals against the decision of Judge Hussain, with the permission of Upper Tribunal Judge Owens.

Factual background

2. The appellant arrived in June 2012 as a student. His visa was curtailed in November 2012, with no right of appeal, as his college's sponsor licence had been revoked. The appellant remained in the United Kingdom unlawfully. He was encountered by the police in February 2016 and detained. It was at that point he claimed asylum, and he was released from detention.

3. The appellant's case was that he began to realise that he was interested in sexual activity with other men when he was around 17 to 18 years of age, having had an initial sexual experience with a man named S, which evolved into a relationship lasting three to four years. It was not until he was 24 years old that he realised what it meant to be gay. He was in the United Kingdom at this stage. He met a man in a park, and the two returned to the appellant's accommodation and engaged in sexual activity. They were caught and photographed while having sex by a man staying with the appellant who had not been expected to return until later in the day. The visitor was a friend of the family from Pakistan. He told the appellant's family what had happened, and the appellant's family disowned him and made threats against him. Since then, the appellant has embedded himself in LGBT culture in this country. He attends gay bars and clubs and has had a number of gay relationships, he claimed.

4. Before the First-tier Tribunal, the appellant relied on witness evidence from two gay Pakistani men, each of whom have been recognised as refugees on account of their sexual orientation, Mr B and Mr N. Mr B provided the tribunal with names of men he thought had had sex with the appellant. In the words of Ms McCallum, Mr N was a "drag queen". He met the appellant through a social media application. They had sex. Mr N has seen the appellant kissing another man and attending events in the LGBT

community. The appellant also gave evidence, describing his experience of "cruising", which he describes as (to quote the judge's unchallenged verbatim summary in the decision below) "where gays get together and have sex in the bush."

5. The appellant's evidence also summarised how he played with girls and dolls in his youth. He was beaten by his father upon being discovered kissing another boy. His family are strict Muslims, he said.

6. The appellant relied on a medical report of Professor Fox, which stated that the appellant has depressive symptoms and severe anxiety symptoms. The professor opined that the presentation of the appellant, and the narrative that he had given during the consultation, was consistent with what he claimed to have happened to him in Pakistan. He had lived in fear of his sexual orientation being discovered by his family, which was compounded by the actual discovery of his sexual orientation in the United Kingdom, and the severing of all contact with his family in 2015. The past concealment, opined the professor, has caused him distress as he was in constant fear of discovery. The appellant presented a significant suicide risk. He had self-harmed in the past.

7. The judge noted at [47] that the appellant's case was not inconsistent with the background materials concerning the experience of gay men in Pakistan. He summarised the appellant's case and his narrative in detail. At [66], the judge said he had taken into account the totality of the evidence, including the appellant's written statement. The appellant had not given a truthful account of his experiences, said the judge, and had not proved to the requisite standard that he is gay.

8. The operative analysis of the judge commenced at [67]; the appellant had delayed claiming asylum for many years after coming here, and only did so after being notified of the decision to remove. The judge said that he did not accept the appellant's explanations for the delay, all of which related to the appellant either not being aware that he could claim asylum, or him being afraid all of being detained and removed to Pakistan. This engaged section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"), found the judge.

9. At [68] the judge gave reasons for rejecting the appellant's explanation for the delay. These included the fact that, by October 2013, the appellant's case was that he had accepted his sexuality and knew that he was unable to go back to Pakistan as he was living a lie. His sexuality had been revealed to his family in 2015. It was "simply unbelievable" for the appellant to suggest that he did not know gay people had rights and acceptance in society in this country, given the extent to which the appellant, on his own case, had had a number of sexual encounters with other men of Pakistani origin. One of the individuals with whom the client had had a sexual relationship, Mr N, met the appellant through a social media application in 2015, and later went on to claim asylum himself. The judge said that he could not imagine that between them, they had not

discussed their respective precarious immigration statuses, and the possibility of seeking asylum on account of their sexual orientation.

10. The judge highlighted disparities between the account given by Mr N and the appellant as to when they had had sex: see [69]. One said it was the summer of 2015, whereas the other said it was in early 2015. Under cross-examination, Mr N accepted that he had moved to Luton, whereas in his statement provided to the respondent, had said that he had moved to Essex. The judge said that his impression was that Mr N had attended court "simply to support the appellant's assertion that he is gay", noting that he had done so on three separate occasions in different appeals. At [70], the judge drew together that analysis, stating that the appellant had, "not given a reasonable explanation as to why he did not apply for asylum until being notified of his proposed removal… As a result, I find his credibility to be deemed damaged."

11. The judge proceeded to direct himself that a finding of "deemed damage" to credibility is not determinative of overall credibility, as it was necessary to assess whether the overall account was credible.

12. At [73], the judge outlined what he considered to be inconsistencies in the way the appellant had described meeting S and his relationship with him, by references to differences between the answers in his asylum interview, on the one hand, and his statement for the appeal, on the other. The judge rejected as implausible the appellant's account of having been photographed while having sex with the man he met in the park, in part because of the inconsistency between the risks the appellant took in engaging in such activity without locking the door, and his claimed reticence and reluctance to express his sexuality. The judge did not accept that photographs would have been taken before the door could have been shut, or the visitor somehow otherwise prevented from capturing the images.

13. The judge did not accept Mr B and Mr N to be witnesses of truth: see [79]. He found that there had been collusion between the witnesses, partly on account of identical passages that featured in each of their statements.

14. Towards the end of this analysis, the judge engaged with the report of Professor Fox. He noted the diagnosis of the appellant's anxiety and depressive disorder, and the link between the appellant's struggle with his sexuality, and his suppression of it in Pakistan. However, the judge was concerned that the medical report highlighted a suicide risk on the part of the appellant, whereas the appellant himself had never mentioned that he experienced suicidal ideation.

15. The most significant aspect of the judge's analysis of Professor Fox may be found at [82]:

> "The professor's observations are in my view remarkable in light of the appellant's silence on the issue. Whilst I do not wish to take issue with the

> diagnosis made by professional, **the absence of any medical history of the appellant reporting himself or being reported by others of either self-harm or depressive illness, in my view, diminishes the value of the opinions expressed by the expert in his report**. It could be that the appellant has a depressive order [sic], but in my view, that would not be sufficient to warrant the grant the [sic] protection will leave under the Human Rights Convention. The absence of any previous history other than attending Talking Therapy coupled with his ability to give as much details as he has given to prepare his very long statement, does not suggest that the appellant's conditions are severe." (Emphasis added)

Grounds of appeal

16. Judge Owens granted permission on all four grounds of appeal:

    a. Ground 1: the tribunal erred in its approach of the evidence of the appellant's witnesses of fact, both homosexual men of Pakistani origin, by rejecting it based on peripheral matters and failing to have regard to material matters.

    b. Ground 2: the tribunal erred in its approach to the expert psychological evidence, by (a) failing to have regard to it and making an assessment of the appellant's credibility, (b) rejecting the expert report's conclusions solely on the basis of the tribunal's (prior) conclusions as to the appellant's credibility and (c) attaching "diminished weight" to it based on a mistake of fact.

    c. Ground 3: the tribunal erred in its approach to assessing the appellant's evidence by failing to apply established legal principles relevant to the assessment of claims based on sexual orientation.

    d. Ground 4: the tribunal erred more generally and failing to make clear findings upon which its conclusion was based.

17. There was no rule 24 response.

Submissions

18. Ms McCallum submits that the judge made a mistake of fact when, at [82], he stated that there was no medical history of the appellant reporting a depressive illness. He had been referred to NHS Talking Therapies for high intensity CBT therapy in 2019 for trauma, low mood, and anger. See the NHS letter dated 17 June 2019 at page 94 of the respondent's bundle. In addition, he had been prescribed citalopram, and by the time of Professor Fox's report, had been using the drug for around four to six months.

19. It was a mistake of fact, therefore, for the judge to diminish the weight attracted by the expert's report on the basis the appellant had not previously reported any depressive illnesses.

20. Ms McCallum's remaining submissions were focussed on the weight ascribed by the judge to different aspects of the evidence. This included his rejection the evidence of Mr N and B, and the absence of any analysis of the photographs and social media screenshots in the bundle. The only references to those materials featured in the judge's summary of the evidence and the hearing, rather than his operative analysis, Ms McCallum submits.

21. Ms McCallum also attacks the judge's analysis of section 8 of the 2004 Act. It was not clear, she submitted, why the judge rejected the appellant's explanation for the delay in claiming asylum. The paragraphs apparently devoted to that issue in the decision did not, in fact, provide any sufficient reasons at all, she submitted.

22. In addition, when considering the issue of delay in this context in particular, it was incumbent upon the judge to have regard to the difficulties experienced by those from conservative cultures seeking to claim asylum on the basis of their sexual orientation. The judge did not consider the approach of the Court of Justice of the European Union in A, B and C v Staatssecretaris van Veiligheid en Justitie C-148/13 to C-150/13, nor other guiding principles applicable to determining asylum claims based on sexual orientation, she submits.

23. As for the evidence of Mr B and Mr N, the judge rejected their evidence without clear or sufficient reasons for finding that they had been dishonest. The reasons given by the judge related to peripheral matters, rather than those which could rationally lead to a finding of the gravity reached by the judge, submitted Ms McCallum. The fact that the witnesses had given evidence in support of other asylum appeals was not a factor which admitted of a finding of dishonesty in the present appeal.

24. Finally, in making assumptions about what was plausible or inherently likely in the appellant's sexual relationships, the judge failed to provide sufficient reasons.

25. In response, Mr Whitwell submitted that the appellant sought to attack individual strands of the judge's analysis, rather than stepping back and considering it in the round. Mr Whitwell did appear to accept that the judge fell into error concerning his analysis of Professor Fox's report, in light of the appellant's prior reports of depression and anxiety, and was neutral as to the impact of that mistake, leaving the matter in my hands. He accepted in relation to the remaining grounds of appeal that, while another judge may have come to a different outcome, the conclusions reached by the judge were not irrational, and nor did they fall into any of the established categories for mistakes of fact to amount to an error of law.

Discussion

26. It is important to recall that an appeal to the Upper Tribunal lies on a point of law, not a point of fact. Findings of fact are not immune from being infected by errors of law. In R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, the Court of Appeal outlined the following categories of errors of fact which may amount to errors of law:

> 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.

27. It is clear the judge made a mistake of fact concerning the factual matrix of the appellant's medical history when analysing the report of Professor Fox. The excerpt from the judge's decision at [82], quoted above, incorrectly states that the reports of low feelings, anxiety and depression made by the appellant to Professor Fox were the first such medical complaints of those conditions. That was simply incorrect. The appellant had received medication for depression. He had attended a course of Talking Therapy, provided by the NHS. The judge overlooked these factors, leading to his incorrect statement that there had been no prior medical history concerning the appellant's depressive illness.

28. The judge's analysis continues to falter in relation to the appellant's medical history. In the final sentence of [82], the judge acknowledges that the appellant had attended Talking Therapy in the past, albeit in the context of seeking to minimise the significance of him having done so. This flatly contradicts his earlier observations in the same paragraph that the appellant had *not* reported such conditions in the past, with the effect that, on the judge's analysis, Professor Fox's conclusions were called into question by the diagnosis of a depressive disorder against a background of no prior relevant medical history.

29. The question then arises as to whether this was an error that was material. Professor Fox's report states that the medical presentation of the appellant was consistent with his reported adolescence and life in Pakistan, seeking to suppress his homosexuality. It was also consistent with the experience of being disowned and threatened by his family. See, for example, paragraphs 4.1, 4.5, and 4.7. This was medical evidence

which should have been considered in the round with the judge's remaining analysis. That is not to say that the medical evidence meant that the judge was bound to find in favour of the appellant, but it was important evidence which the judge had understood incorrectly due to an error of fact, and which was not considered, in the round, with the remaining evidence.

30. In addition, the judge did not address the analysis of Professor Fox until the end of his decision, having already reached adverse findings against the appellant. While this tribunal should be slow to interfere with findings of fact, and should not seek to micromanage the structure of First-tier Tribunal decisions, it does appear that the judge relegated the importance of Professor Fox's report to the periphery of his analysis, perhaps due to the mistaken factual premise upon which the judge approached the report. Had the judge correctly understood the appellant's prior medical history, he may well have ascribed greater significance to the report of Professor Fox, in particular the medical corroboration it provided to the appellant's narrative. Of course, it does not necessarily follow that the judge would have been bound to find in favour of the appellant had he considered the report in its correct factual light, but it would have been incumbent upon the judge to provide factually accurate reasons for rejecting the appellant's narrative as supported by Professor Fox's report. This the judge did not do.

31. As Ms McCallum submits, this error alone is sufficient to taint the judge's entire credibility assessment. Mr Whitwell was neutral on this issue, leaving the matter in my hands. He was quite right to do so, as this aspect of Ms McCallum's submissions was compelling, and has considerable force.

32. Considering the above analysis, it is not necessary for me to engage in depth with the remaining grounds of appeal advanced by the appellant. The remainder of the judge's credibility analysis took place against a background of a factual mistake and was tainted.

33. It is with considerable reluctance that an appellate judge should overturn the findings of fact reached by the primary factfinder. The remaining submissions advanced by Ms McCallum were primarily complaints due to the weight attracted by different aspects of the case. Much of her case was characterised by "island hopping" of the sort deprecated by the Court of Appeal in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, which observed at [114.iv] that trial judges have the benefit of the whole sea of the evidence, in contrast to the position of an appellate tribunal, which by definition cannot enjoy the same comprehensive overview of the evidence. Whereas Ms McCallum's submissions sought to hold the judge to a counsel of perfection, the Court of Appeal has in the past required only that decisions be "tolerably clear"; see, for example, UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095 at [32].

34. What is not clear, not even tolerably so, however, is whether the judge would have reached those same findings had he correctly understood the

medical evidence. On that basis alone, therefore, this appeal must succeed.

35. I set the decision of Judge Hussain aside with no findings of fact preserved.

36. Given an extensive credibility assessment is required, pursuant to paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* dated 13 November 2014, and the overriding objective, it will be appropriate to remit this matter to the First-tier Tribunal to be heard afresh.

Anonymity

37. I maintain the anonymity order already in force.

Notice of Decision

This appeal is allowed.

The decision of Judge Hussain involved the making of an error of law and is set aside.

The case is remitted to the First-tier Tribunal to be heard by a different judge.

I maintain the anonymity order already in force.

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 16 November 2020

Upper Tribunal Judge Stephen Smith