



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: PA/00991/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 20 September 2017

Decision and Reasons Promulgated
On : 6 October 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

[A T]

~~ANONYMITY DIRECTION NOT MADE~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr B Lams, counsel (instructed by SBG Solicitors)

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh, born on [] 1986. He appeals with permission against the decision of First-tier Tribunal Judge Clemes, promulgated on 24 March 2017 dismissing his appeal against the decision of the respondent refusing his application for asylum, humanitarian protection and human rights.
2. Mr Lams, who represented the appellant at the hearing before the First-tier Tribunal, adopted his grounds of appeal. Mr Lams contended that the Judge was irrational in placing weight in the failure of the appellant to attend the screening

interview scheduled for 30 June 2016. The appellant had prepared his case fully before the date of a doctor's appointment. He was interested in taking his case forward. The appellant attended his appeal hearing and gave evidence.

3. However, at [27b], the Judge stated in his conclusions and findings that there was a delay after making his claim as the appellant was absent from his first asylum appointment.
4. The Judge stated that if that were the sole issue or occasion where he had not maintained the prosecution of his claim, then it would be a "minuscule point" but it is set against the background of the lateness of the claim in the first place. The Judge stated that although he claimed that his solicitors contacted the respondent to explain that he was ill, he had not seen any satisfactory evidence of any such correspondence or indeed medical evidence to back up the claimed excuse for not attending the interview, namely illness through vomiting.
5. Judge Clemes stated that after he failed to attend the first interview, the respondent was left wondering as to where he was and why he had not attended. She encountered him by chance on an enforcement visit and he revived his claim. The Judge stated at [27(b)] that if he was a genuine asylum seeker he would (now) have the medical evidence and proof of notification of the reasons for his absence and would have been keen to set up an alternative appointment. He cannot objectively maintain that either of these applied to him. The Judge was accordingly not satisfied that the appellant is credible and was not prepared to rely on what he told him about this issue.
6. Mr Lams submitted that the conclusion that the appellant had not maintained the prosecution of his claim failed to take account of the fact that he had himself initiated contact by contacting the asylum intake unit to arrange an appointment on 24 June 2016. Further, prior to this he had undertaken a considerable amount of preparation of his claim. He had by then instructed solicitors, made a witness statement dated 26 June 2016. Moreover, his solicitors had instructed an expert who wrote a report dated 18 June 2016 which was produced.
7. The chronology of these events has never been challenged and was in any event clear from the material in the Home Office bundle.
8. Nor was the appellant "encountered by chance"; in fact he was detained during a targeted enforcement visit to his home on 26 July 2016, indicating that he had given his address to the Home Office and had not sought to abscond.
9. Mr Lams submitted that the Judge also erred in his conclusions at [27(c)]. He stated that the appellant was an evasive witness who blamed others for shortcomings in his case. It was the fault of the interpreters that there were discrepancies in his interviews. The organisation Livewell have tried to support him on the claimed issue of interpretation from the appellant, with their interview, but the Judge was satisfied that the appellant gave the answer recorded at the time, namely that he said that he had problems with his sexuality whilst in Bangladesh, which was a lie.

He found that the appellant was by February 2017, when his appeal hearing was looming, trying to eliminate areas where he might have been inconsistent. He was satisfied that the appellant had no issues in Bangladesh with his sexuality as he is not homosexual at all. He was trying to exaggerate his claim when he saw Livewell in November 2016 and by February 2017 he had realised the effect of this.

10. Mr Lams submitted that the Judge failed to place any weight on the letter from Livewell who pointed out the difficulties in the interpretation. The letter which was in the appellant's bundle (page 24) stated that it is recorded in the assessment paperwork that there were difficulties in attaining an interpreter that provided a competent level of translation for the assessment. The appellant speaks limited English and he requested that they discuss his sexuality without an interpreter due to his fears of potential repercussions and discrimination should he be recognised.
11. Mr Lams submitted that this is confirmed in the Livewell notes, which were in the Home Office bundle at page 17. He referred to the assessment from Livewell at J1 onwards. It is recorded at H1 that the assessment was completed over two meetings due to difficulties obtaining an interpreter that could provide a competent level of translation for the assessment. The appellant speaks limited English and he requested that they discuss his sexuality without an interpreter. An interpreter was used to communicate between English and Bengali and achieved a good level of understanding.
12. Mr Lams submitted that the negative credibility finding hinged on which tense had been used, namely, whether he would suffer discrimination/persecution in Bangladesh due to his sexuality as opposed to whether he had suffered discrimination and persecution there. That is referred to at paragraph [22] of the decision.
13. Mr Lams submitted that the Judge thus ignored the independent and contemporaneous evidence from Livewell relating to translation difficulties and addressing this issue.
14. He further submitted that the Judge failed to take into account the evidence of the appellant's cousin who stated that the appellant had never spoken about his sexuality to anyone in Bangladesh. His cousin was 8 months' pregnant at the time. The Judge erred in relation to her evidence by apparently dismissing the fact that she was pregnant, as "a justifiable reason" for not travelling from her home in East London to the hearing centre in Newport, South Wales, to give evidence – [21]. Mr Lams submitted that on its own this might not be so important. It is nevertheless another unfair point. She was eight months' pregnant at the time. The hearing began at 10am. She would have had to leave very early in the morning to undertake a long trip to South Wales. To state that this was "not justifiable" is, he contended, "an unfair point."
15. Mr Lams submitted that the approach to the evidence of Mr Ayres, on the basis that he was not medically qualified, was flawed. The Judge stated that it is unlikely that

someone without medical qualifications can speak authoritatively of another's sexuality based on limited, isolated and informal observations as he seeks to do. [27(e)].

16. Moreover, the Judge was not even handed in this respect. He did not apply the same cautious criteria to the author of the Home Office refusal letter who, with no stated medical qualifications, and on the strength of a single interview, made a highly subjective finding on the issue of the appellant's sexuality, stating that: "the fact that you have shown little evidence of any developing self awareness with regard to your sexuality is considered to undermine your credibility" (refusal letter, paragraph 30). The author also stated that there was little evidence of introspection and self awareness regarding his sexuality (refusal letter, paragraph 43).
17. He submitted that the evidence of Mr Ayres was wrongly given short shrift. The Judge raised the bar too high. Mr Ayres was in the position to give meaningful evidence. It was wrong just to write off his evidence.
18. He also submitted that the Judge failed to take into account the fact, as evidenced by Professor Menski's view, that it was plausible from the appellant's background that there were strong cultural reasons for him not to reveal the nature of his claim. At paragraph 17 of his report he stated that it is certainly plausible that a young Muslim male from Bangladesh could not openly discuss and disclose his homosexual status and inclinations and would struggle with this.
19. On behalf of the respondent, Mr Melvin relied on the Rule 24 response. He submitted that the Judge made adequate findings of fact and gave adequate reasons for the adverse credibility findings set out from paragraph 27. The grounds amount to a disagreement with the findings made by the Judge.
20. Mr Melvin submitted that regard must be had to the credibility findings "holistically". There were numerous findings, not in any particular order.
21. He referred to the decision in VHR (Unmeritorious grounds) [2014] UKUT 367. The Tribunal there held that appeals should not be mounted on the basis of a litany of forensic criticisms of particular findings of the First-tier Tribunal whilst ignoring the basic legal test which the appellant has to meet.
22. With regard to ground 1, he submitted that it is up to the Judge whom he believes. Although an attendance note was produced prior to the First-tier Tribunal hearing indicating that the solicitors had telephoned the Home Office seeking to arrange a further interview as the appellant was unwell, that note had not been placed before the Judge.
23. The finding with regard to the Livewell letter was open to the Judge because he had rejected the evidence of the appellant, finding that he had exaggerated his claim.
24. With regard to the Judge's approach to the evidence of his cousin, he noted that it was the appellant who told her that he was a gay man. This was accordingly second hand evidence. She did not attend the hearing and therefore could not be tested.

25. As to the evidence of Mr Ayres, the Judge was satisfied it was produced to bolster his claim. There was no other evidence of his belonging to any other organisation. The finding was accordingly open to the Judge.
26. Mr Melvin also noted that the appellant had before then made numerous applications.
27. In reply Mr Lams submitted that there is no parallel between the facts of this case and VHR.
28. The cultural issues bore upon the explanation for the timing of the claim. That should have been considered. The Judge however ignored the cultural context. This does not constitute a mere disagreement with the Judge's finding: The finding was produced following a material error.
29. With regard to the Livewell assessment, this was not an ex-post facto justification relating to inconsistency. There was indeed a contemporaneous note recorded about the fact that the interpreter should not be used. This is clearly set out in the assessment at I7 and I8. There was no reason to suppose that Livewell was in any way biased. The letter from Livewell, dated 13 December 2016, followed an assessment which took place on 29 November.

Assessment

30. The Judge found that the failure to attend his first interview damaged the appellant's credibility and showed that he had not maintained the prosecution of his claim - [27b]. The Judge did not in the circumstances consider this to be a "minuscule point" as it is set against the background of the lateness of the claim in the first place.
31. The Judge further stated that having failed to attend the first appointment, the respondent was left wondering as to where he was and why he had not attended.
32. However, he was not merely encountered by chance at his house. This was a targeted enforcement visit to his home at the address that he had given to the respondent. He had never sought to abscond.
33. The Judge considered that these matters affected the credibility of his claim.
34. However the Judge was required to consider the evidence as a whole before coming to such an adverse conclusion. In particular, as submitted by Mr Lams, the evidence was that the appellant had been prosecuting his claim. He had attended Livewell for an assessment. His assessment was completed over two meetings on account of difficulties in obtaining a competent interpreter. The organisation provided the mental health assessment to his GP on 13 December 2016. He had already produced an expert report from Professor Menski dated 18 June 2016. That report pre-dated the occasion that the appellant contacted the asylum intake unit to make an appointment to claim asylum. That contact occurred on 24 June 2016. He did not attend the appointment which was arranged for 30 June 2016.

35. Moreover, the appellant during his evidence informed the Tribunal that his solicitors did contact the respondent to explain that he was ill.
36. Before making adverse credibility findings that the appellant was not a genuine asylum seeker, the Judge should accordingly have considered the amount of preparation that the appellant had undertaken at that stage. As already noted he instructed solicitors and had made a witness statement on 26 June 2016; an expert was instructed in the middle of June. Professor Menski wrote a report dated 18 June 2016. This evidence was not challenged and was part of the Home Office bundle. Moreover, the appellant was at home at his address which he gave to the Home Office.
37. The Judge had also before him the evidence from Livewell which pointed to the difficulties that the organisation experienced with the appellant with regard to interpretation. It is recorded that there were difficulties obtaining an interpreter to provide a competent level of translation for the purpose of the assessment. The appellant only spoke limited English. This resulted in the assessment being completed over two meetings on account of the difficulty of obtaining a competent interpreter.
38. The Judge made a negative credibility finding based upon the tense that had been used as to whether he *would* suffer discrimination in Bangladesh, or whether he *had* suffered discrimination. That issue should have been further explored before making a finding that the appellant had no issues in Bangladesh regarding his sexuality and that he was trying to exaggerate his claim when he saw Livewell [27c]. This might have been as a result of the appellant speaking himself or that a substandard interpreter was being used when the statement was made. The Judge however adopted an unwarranted scepticism, ignoring evidence relating to the evident translation difficulties identified by Livewell.
39. The Judge moreover did not have proper regard to the inconvenience and potential discomfort that his eight months' pregnant cousin would suffer travelling from her home in East London to the hearing centre in Newport to give evidence.
40. The Judge also failed to consider strong cultural reasons identified by Professor Menski relating to the appellant's reluctance openly to discuss and disclose his homosexual status.
41. Moreover, he erred in dismissing the evidence of Mr Ayers simply on the basis that he was not medically qualified, without considering the evidence of his attending a gay pub with the appellant on two occasions as well as attendances at Pride. Mr Ayers gave reasons for his conclusion that he had no doubt that the appellant is a gay man.
42. There is some force in Mr Lams' submission that the Judge did not apply the same strict approach when assessing Mr Ayre's evidence, to the assessment of the author of the refusal letter who made highly subjective findings relating to the appellant's sexuality.

43. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of material errors on a point of law. I set aside the decision.
44. I remit the appeal to the First-tier Tribunal for a fresh decision to be made. The extent of judicial fact finding is extensive. There will be a complete re-hearing with no findings preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is remitted to the First-tier Tribunal, Newport, for a fresh decision to be made before another Judge.

No anonymity direction made.

Signed

Date 4 October 2017

Deputy Upper Tribunal Judge Mailer