



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00942/2017

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Decision & Reasons Promulgated
On 24 May 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

N A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Robinson, Counsel instructed by IIAS (Levenshulme)
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant, a national of Pakistan, has permission to challenge the decision of Judge McGinty of the First-tier Tribunal (FtT) sent on 6 November 2017 dismissing his appeal against the decision made by the respondent on 19 January 2017 refusing

his protection claim. The basis of the appellant's claim is that he would be at risk on return to Pakistan because he is gay. The judge accepted that if the appellant was gay he would face a real risk of persecution on return to Pakistan but concluded he was not gay.

2. Five points are raised in the grounds, it being contended that the judge erred in (i) failing to take account of the appellant's age, i.e. that he was a minor when some of the incidents occurred; (ii) failing to take into account the appellant's vulnerable mental health as evidenced by the LGBT Foundation counselling notes; (iii) unlawfully focusing on the appellant's evidence regarding sexual/physical encounters with men; (iv) failing to take into account the cultural context particularly in relation to the wife's evidence; and (v) acting irrationally in relation to the appellant's ability to access the protection of police in Pakistan.
3. I heard excellent submissions from both representatives.
4. Despite Mr Bates' valiant efforts to persuade me otherwise I have concluded that the judge's decision is vitiated by legal error. Tribunal judges are well-used to dealing with cases in which a main issue is sexual orientation, but they have also been given guidance by the higher courts emphasising the need for a careful and sensitive approach to cases of this kind, typified by the CJEU ruling in Case C-148 13, A, B and C. In my judgement, all but one of the five grounds identify respects in which the judge failed to demonstrate such an approach.
5. Dealing with ground (i), Mr Bates is right to highlight that when the appellant made his claim for asylum he was a mature adult and some of the key events he claimed happened to him in Pakistan occurred when he was an adult. At the same time, more than one incident took place when the appellant was a minor and the judge should at least have considered whether that may have affected his ability to recollect it in a consistent fashion: see **KS (benefit of the doubt)** [2014] UKUT 552 (IAC).
6. As regards ground (ii), Mr Bates is right to say that there was no medical report from a doctor and that the appellant was represented by experienced Counsel who made no application that he be treated as a vulnerable witness. It remains in my view that the judge should have given consideration to whether to treat the appellant as a vulnerable witness in accordance with the Joint Presidential Guidance Note 2010 and the Court of Appeal guidance in **AM (Afghanistan)** [2017] EWCA Civ 1123. Not only did the judge have before him counselling notes but he recorded that he considered these to have some positive value; stating at paragraph 19 that these notes:-

"would tend to support the Appellant's credibility, in that it appears that [he] had attended counselling at which he has said that he is struggling with his sexuality and needed counselling in respect thereof".
7. At the very least, therefore, the judge should have addressed whether these notes sufficed to warrant treating the appellant as a vulnerable witness and in consequence whether to make allowances for discrepancies in his evidence, etc.

8. It is no answer to this difficulty to say that the judge found the appellant not credible, therefore the counselling notes had no positive weight, since the judge was obliged to assess credibility taking account of the evidence as a whole, including the counselling notes.
9. Ms Robinson clarified that the focus of ground (iii) was not on the interviewing officer's examination of the appellant during the asylum interview, but rather the judge's strong reliance on the appellant's evidence regarding his sexual activity to the exclusion of his evidence regarding his orientation. Ms Robinson, accurately in my view, dwelt on the judge's treatment of the evidence of one of the witnesses, Mr Wilson, at paragraph 20:

"I have also taken account of the fact of what Mr L W told me, the Appellant has attended several gay bars with him, and in gay bars where gay pornography has been shown, and that Mr L W says that they have kissed and cuddled, and that he has become very close friends with the Appellant and that he does not feel that he is having the wool pulled over his eyes. However, I have borne in mind the fact that neither Mr L W, nor Mr L W, nor Mr M Ali, who himself is said to be straight rather than gay, has actually had sexual relations with the Appellant, I do bear in mind that there is a possibility that they are having the wool pulled over their eyes."
10. Whether or not the appellant had had sexual relations with Mr L W, this man's evidence narrated behaviour which was expressive of a gay orientation ("kissing," "cuddling" of a person of the same sex). The judge appears to have disregarded that aspect of the witness's evidence simply because the two had not had sexual relations (see also paragraphs 27 and 29).
11. I see little or no force in ground (iv) as it seems to me the judge was entitled to consider that concern by a wife on health grounds about a husband's extra-marital sexual relations and their extent was likely to be cross-cultural. Although the judge earlier described her evidence as "consistent" that is not the same as accepting its credibility.
12. Ground (v) is weakened somewhat by the fact that it attacks a seemingly secondary reason the judge gave for disbelieving the appellant's account regarding an incident when the appellant was at college. Nevertheless to count against the appellant that he had not adequately explained to the police that he was being blackmailed sits uneasily with the judge's earlier acceptance that Pakistan was unsafe for homosexuals (paragraph 19) which logically entailed being satisfied there would be no effective police protection.
13. I do not seek in any way to suggest that the appellant's claim is a strong one but I cannot exclude that the judge's erroneous approach to the evidence potentially affected his final assessment.

14. For the above reasons I set aside the decision of the FtT judge for material error of law. Whilst I do not consider that any of the judge's findings of fact as regards the appellant's evidence can be preserved, I have noted any challenge from the respondent to the judge's assessment that his witnesses, L W and Mr L W were independent witnesses and nothing they said caused him to doubt their veracity (the only point taken against them was that they were having the "wool pulled over their eyes". Unless either of the parties applies to the Tribunal within fourteen days of receipt of my decision for them to be called again as witnesses at the next hearing, I consider their evidence can stand. That means that the case before the First-tier Tribunal could be timed for less than time than previously.

15. To conclude:

the decision of the FtT judge is set aside for material error of law;

the case is remitted to the FtT (not before Judge McGinty).

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

Date: 22 May 2018



Dr H H Storey
Judge of the Upper Tribunal