



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/06262/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 October 2018**

**Decision & Reasons Promulgated
On 15 October 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**SHAHBAZ [H]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel instructed by Lexmark Legal Associates

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 1 January 1980. He initially arrived in the UK in September 2011 as a visitor with leave granted until February 2012. Ultimately, after his arrest on 11 March 2018 and there having been previous immigration proceedings in the interim, the appellant made a claim for asylum on 15 March 2018.
2. In a decision dated 2 May 2018 the respondent refused that claim. The appellant appealed to the First-tier Tribunal against that decision and his

appeal came before First-tier Tribunal Judge Hembrough who dismissed the appeal.

Judge Hembrough's decision

3. The further circumstances of the appellant's case are best illustrated with reference to the decision of Judge Hembrough.
4. He set out the basis of the appellant's claim which is that he would be at risk of persecution in Pakistan on account of his membership of a particular social group as a gay man. He summarised the appellant's immigration history. He referred to the fact that on 5 April 2013 the appellant applied for leave to remain on human rights grounds. That application was refused with no right of appeal. Then, on 28 May 2013, the appellant applied for an EEA residence card as the extended family member of Agnieszka Krzyskow who is a Polish citizen whom he claims to have married in an Islamic ceremony. That application was refused on 28 January 2014 and his appeal at which Ms Krzyskow gave evidence, was dismissed by First-tier Tribunal Judge Khawar in a decision promulgated on 31 October 2014.
5. A further application was submitted on 14 November 2014, again based on his relationship with Ms Krzyskow. That application was again refused and his appeal was dismissed by First-tier Judge Butler in a decision promulgated on 2 October 2015. Neither the appellant nor Ms Krzyskow appeared for that hearing.
6. It was in March 2018 that the appellant was encountered during what is described as an enforcement visit to premises in Watford where he was arrested and detained and served with notice of liability to removal. That was when he claimed asylum saying that he had been beaten and stabbed by his family in Pakistan when they discovered his sexuality in 2007. He is said to have scarring as a result.
7. Judge Hembrough referred to a 'rule 35' medical examination carried out on 15 March 2018 which confirmed that he had scarring consistent with "the mechanism described".
8. He then summarised the basis of the appellant's asylum claim as well as his family circumstances in Pakistan. It appears from that summary that the appellant realised he was attracted to boys when he was about 9 or 10 years old, which was when he first engaged in a sexual act with a male friend who forced him to continue a sexual relationship by threatening to tell others about it. The appellant apparently identified himself as gay from about the age of 14 onwards. His case was that he did not tell anyone about his sexual orientation but his family began to suspect. The appellant said that at the time he did not realise that same-sex relationships were against the law in Pakistan and only claimed to have been aware of this when he was aged about 18 or 19 years, although he always believed that it was wrong.

9. The appellant's case was that he had been blackmailed into having sexual relationships and being forced into such relationships on a number of occasions. One of his brothers became aware of his sexuality and the appellant was beaten up. The family then decided that he ought to get married and thus he became involved in an arranged marriage with a cousin but continued to have sexual encounters with men.
10. He has three children of the marriage who at the date of the decision before Judge Hembrough were aged 7, 9 and 11 years, respectively. In 2007 his wife found out about his sexuality and complained to his brothers who beat him and stabbed him in the leg. He was also hit on the back of his head with a stone and he has scarring as a result. He was continually blackmailed by his friends into engaging in further sexual encounters.
11. Eventually his wife divorced him, although it appears that different dates for the divorce, ranging from 2008, 2009 or 2010, were given. The appellant's case was that he had not had any contact with his now ex-wife or children for four or five years. He had continued to live in the family home until he came to the UK, although his brothers in Pakistan continued to beat him. His father passed away in June 2011 and his mother in December of that year.
12. Continuing, the appellant's claim was that he came to the UK to visit his brothers and overstayed, fearing that his life would be in danger in Pakistan on account of his sexuality. Until recently he had been supported by his brothers here in the UK, however he did not disclose his sexuality to them as he was dependent upon them. He has not worked since his arrival. He had now fallen out with his brothers in the UK and he believes that it was they who informed on him to the immigration authorities.
13. As regards his relationship with Ms Krzyskow, he said that they had lived together for about 18 months but she had left him because he spent too much time with his friends.
14. For the previous six or seven months he had been living with a friend called Naim and had been a regular attendee at a gay club, the name of which he was unable to recall. He submitted a number of photographs showing him at a gay club. He said that he did not claim asylum until he was detained by immigration authorities as he did not know anything about claiming and did not have the money to pay a lawyer to give him advice until his nephew gave him some money.
15. The refusal letter was also summarised by Judge Hembrough. After referring to the relevant legal framework and to the documentary evidence, he summarised the oral evidence.
16. The appellant's claim was supported by a number of witnesses called on his behalf. One in particular, Saied Reza Birjandi, is the subject of the grounds of appeal. That witness said that he is an LGBT activist and hosts parties at clubs in the London and Manchester areas. He had seen the

appellant regularly at such parties many times, approaching the same person and spending the evening with him and enjoying each other's company. In cross-examination he said that he met the appellant at Club Kali in London, some time in 2017. When he was asked whether he knew the appellant was in a relationship he said that he had seen him mingling with the same person for the whole night. He was unable to say how many times he had seen them. At [60] Judge Hembrough said as follows:

"I observed that this witness was known to me having appeared before me in a previous appeal in which the Appellant's sexuality was in issue and I asked him whether he was being paid for his attendance at the hearing. He responded in the negative stating that his work as an LGBT activist and with the NAZ Consortium, which provides advice and support to members of the LGBT community on sexual health and related matters, brought him into contact with many gay men from the South Asian community."

17. I quote that paragraph in full because it is pertinent to the complaint made in relation to Judge Hembrough's decision about his assessment of this witness.
18. Judge Hembrough then made a number of findings. Prior to making his findings he remarked that having determined a number of similar appeals he was familiar with the respondent's operational guidance in relation to sexual orientation in asylum claims and UNHCR guidance on the same matters. He then made some general observations in relation to the assessment of such claims. No complaint is made about the judge's reflections in that respect. He reminded himself that a rounded and individualised assessment was required in each case.
19. He referred to the fact that the appellant was examined in detention by a Dr Pitchiah Balu who is a consultant psychiatrist and whose report in the appellant's bundle indicated that the appellant was found to meet the diagnostic criteria for PTSD which it was said can affect recall and memory. Judge Hembrough said that the diagnosis was based upon one interview with the appellant of unspecified duration and an unquestioning acceptance of the appellant's account of the background to his asylum claim and his claimed symptoms.
20. However, he also said at [69] that even on the appellant's own account he had shown himself willing to lie to the Home Office and the Tribunal and to fabricate evidence so as to be able to achieve status within the UK. His evidence was that he had lied when giving evidence before Judge Khawar and the appellant had said that the photographs showing him kissing and cuddling with Ms Krzyskow were staged. Judge Hembrough then said that he treated what the appellant told Dr Balu "with a degree of circumspection".
21. At [70] he said that despite claiming to suffer from depression and memory issues there was no suggestion that the appellant was not competent to give evidence on his own account. Nor was there any application that he should be treated as a vulnerable witness. He said at

[71] that although the rule 35 medical report concluded that the appellant had injuries which are consistent with the mechanism described, taken at its highest all it established was that at some time in the past he was the victim of an attack involving the use of a knife.

22. At [72] he said that having considered the evidence in the round he was not satisfied that the appellant had given a true and accurate account of the background to his asylum claim. At [74] he referred to the appellant having said in oral evidence, for the first time, that he had been raped aged 7 or 8, but that was not something that he had previously disclosed, either to his legal representatives or to Dr Balu. He said that that was not an issue that was pursued by either of the representatives at the hearing, and whilst he acknowledged as documented by Dr Balu that avoidance behaviours are symptomatic of PTSD, he concluded that he was left with the impression that this allegation was something that the appellant made up on the spot as an embellishment to his claim. Moreover, he said, in the absence of expert evidence he found it difficult to accept that being raped as a child would give rise to a predilection for same-sex relationships in the future.
23. He went on to conclude at [75] that he was not able to reconcile his account that all of his same-sex relationships in Pakistan were “forced” with his description that they were “good relationships”.
24. He found at [76] that the appellant had not established that he was forced into marriage with his cousin. He noted that he was less than candid about the existence of the marriage when giving his evidence before Judge Khawar and he referred to [14] of Judge Khawar’s decision in this respect. He referred to the appellant’s screening interview where he gave the ages of his children as 7, 9 and 11 years. He found that indicated that he had a long term sexual relationship with his wife right up to the point that he left Pakistan. If his youngest child was 7 he would have been born in 2011 or thereabouts. That, he said, gave the lie to the appellant’s evidence that the marriage effectively came to an end in 2007 when his wife discovered that he was gay and that he was divorced in 2008/9 or 2010, as claimed in the interview.
25. He went on to state in the next paragraph that the appellant’s account of his relationship with Ms Krzyskow was similarly inconsistent. On the one hand he claimed that he had been forced into the relationship by his brothers in the UK yet he had accepted that they had had a sexual relationship which resulted in her telling him that she was pregnant. She gave evidence at the hearing before Judge Khawar to the effect that their relationship was genuine and subsisting and the evidence was that they had been living together since their Islamic marriage on 7 February 2013. The hearing took place twenty months later on 3 October 2014. Judge Hembrough said that clearly she was convinced that the relationship was genuine. He also said that he had noted that the photographic evidence was adduced showing them kissing etc. which the appellant now claimed was staged.

26. He went on to state that the appellant was unable satisfactorily to explain why, even if he was pressurised into marrying her, he had made three applications to regularise his status on the basis of that relationship. Whilst he sought to explain his failure to claim asylum by asserting that he did not have any knowledge of asylum law and could not afford legal representation, Judge Hembrough noted that all of his applications were submitted by an OISC accredited legal representative who also represented him at the hearing before Judge Khawar. He therefore found that his credibility was undermined by his failure to claim asylum until encountered on 11 March 2018.
27. He went on to state that he found the appellant inconsistent as to the reason why his brothers had thrown him out. At [81] he said that he had given a vague and unsubstantiated account of his sexual history. In interview he had claimed to be a regular attendee at a gay club that he was unable to name. Latterly however, he had produced photographs which Judge Hembrough found had been staged. He said as follows:
- “To say that the Appellant looks uncomfortable in his surroundings would be something of an understatement. The more so when contrasted with the happy smiling Appellant shown in the photographs with Ms Krzyskow”.
28. He said at [82] that he did not accept as credible that the only person who could have given direct evidence as regards his claimed sexual orientation was a person known as Naim who did not attend because he could not get time off work. He noted that there was no witness statement from Naim and no evidence that an application had been made for a “witness order”, as he described it, to secure his attendance.
29. He then went on to state that the witnesses who gave evidence were wholly lacking in credibility and he was left with the impression that they had been “bussed in” to support the appeal. He said that none of them appeared to know anything about the appellant. As to the particulars of the evidence of the witnesses, he said that the appellant did not even know the witness Mr Chaudri was a professional dancer at the club where they claimed to have met. Mr Mazhar’s evidence was in direct conflict with that given by the appellant in that he said that his uncles and father had issued threats against the appellant, whereas the appellant claimed to be in fear of his own brothers in Pakistan. He concluded that Mr Khan simply lied when he said that he had known the appellant for two years. The appellant’s evidence was that he had never visited a gay club until eight months ago and that they had met four or five months previously.
30. He then dealt with the evidence of Mr Birjandi. He said that he was a familiar witness before the Tribunal, of whom he had previous experience. He said that his evidence was vague in the extreme and to some extent mirrored that given in the previous appeal in which he appeared before him. Judge Hembrough cited the appeal reference number.

31. He concluded that taken at its highest the evidence of all the witnesses was that the appellant had simply attended gay clubs on more than one occasion, but that he had done so was simply an attempt to bolster a weak and opportunistic asylum claim based on sexual orientation. Thus, he concluded that the appellant had not established that he was a gay man and accordingly would not be at risk of persecution on return to Pakistan.
32. He then dealt with Article 8 in terms of the Rules and s.117 of the Nationality, Immigration and Asylum Act 2002, dismissing the appeal on Article 8 grounds.

The grounds of appeal and submissions

33. The grounds of appeal on which permission was granted contend that Judge Hembrough gave insufficient weight to the medico-legal report of Dr Balu. It is also argued that he had erred in his conclusions in relation to the witness, Mr Birjandi, his not having specified how what he said was his knowledge of the witness had affected the credibility assessment.
34. The grounds refer to Dr Balu's report which stated that the appellant was suffering from PTSD. It is argued that although Judge Hembrough said that he treated Dr Balu's evidence with a degree of circumspection, his report was a very important piece of evidence which was afforded "insufficient weight".
35. The grounds state that prior to this appeal there had been no previous determinations relating to the appellant's sexuality or history of maltreatment in Pakistan, and as such it was open to Dr Balu to take into account what the appellant said during the clinical examination and to base an assessment of the appellant's credibility on it. Dr Balu had access to other information beyond what the appellant said during the course of the medical examination, including the rule 35 report, Home Office documents in the form of the response to the rule 35 report, monthly progress reports and the asylum interviews. Thus, the grounds contend that it was wrong of Judge Hembrough to give less weight to Dr Balu's report "solely on the basis of his findings regarding the Appellant's credibility".
36. It is also argued that Judge Hembrough erred in stating that the diagnosis of PTSD was based upon one interview with the appellant of unspecified duration and an unquestioning acceptance of the appellant's account of the background of his asylum claim and his claimed symptoms. However, Dr Balu stated that he spent about an hour reviewing the documents and interviewing the appellant.
37. A complaint is also made in the grounds about Judge Hembrough's assessment of the rule 35 report. Although Judge Hembrough had said that all that that evidence established was that at some time in the past he was the victim of an attack involving the use of a knife, the grounds suggest that greater weight should have been afforded to the opinions of

two different medical professionals, that is to say Dr Balu and the author of the rule 35 report, with both finding the appellant's account consistent.

38. In submissions on behalf of the appellant Mr Balroop relied on the grounds including in relation to Dr Balu's report. The complaint raised in the grounds in relation to Judge Hembrough's evaluation of the evidence of Mr Birjandi was the main focus for the argument advanced on behalf of the appellant before me. I have quoted from Judge Hembrough's decision in this respect.
39. It is said in the grounds that the appellant should have been afforded the opportunity to comment on that issue. The prior knowledge or the extent of it, was not made clear to the appellant or his representative. It was submitted that this was a witness who was corroborative of the appellant's sexuality and it was a matter of fairness that the appellant should have been afforded the opportunity to comment.
40. Mr Tarlow referred to specific aspects of Judge Hembrough's decision, ultimately submitting that any error on the part of Judge Hembrough in respect of his assessment of the evidence of Mr Birjandi was not material.
41. Mr Balroop in reply argued that the error of law in this respect was material. I was reminded that this was a protection claim which required anxious scrutiny.

Assessment and Conclusions

42. Dealing with the grounds in order. There is no merit in the contention that it was wrong for Judge Hembrough to give less weight to Dr Balu's report "solely on the basis of his findings regarding the Appellant's credibility". It is clear that that was not the basis of Judge Hembrough's conclusions in this respect. He did not afford less weight to that report on the basis of findings regarding the appellant's credibility. He assessed the evidence in Dr Balu's report in the context of the evidence overall. His decision does not reveal previous findings on credibility prior to his conclusions in relation to Dr Balu's report.
43. What Judge Hembrough actually said was that he treated what was said to Dr Balu by the appellant with a degree of circumspection. That is not a rejection of everything that is contained within Dr Balu's report. In that same paragraph Judge Hembrough noted that even on the appellant's own account he had shown himself to have lied to the Home Office and to the Tribunal and to have fabricated evidence so as to achieve status in the UK. That was what his claimed relationship with Ms Krzyskow was all about and the appellant also said that the photographs of him with Ms Krzyskow were staged. On that basis, Judge Hembrough was entitled to treat what was said to Dr Balu by the appellant with a degree of circumspection. There is no error in his assessment in that respect.

44. It could be said that Judge Hembrough was wrong to say that the medical examination of the appellant was of unspecified duration, at least on one view of the evidence. However, if one accepts what is said in the medical report that about an hour was spent reviewing the documents and interviewing the appellant, what Judge Hembrough said was correct in that the diagnosis was based upon one interview with the appellant of unspecified duration. Dr Balu said that he spent an hour reviewing the documents and interviewing the appellant. In that sense it is not apparent how long the actual interview with the appellant was. In any event, even if it could be said that Judge Hembrough was in error in his appreciation of the facts, it is not an error of fact that amounts to an error of law, still less one that is material.
45. As to the complaint made about Judge Hembrough's assessment of the evidence of Mr Birjandi, I do consider that there is merit in that complaint. It is not absolutely clear from [60] that he made the parties aware that the witness was known to him. His decision tends to suggest that he did because having said at [60] that he "observed" that the witness was known to him, he then asked the witness whether he was being paid for his attendance at the hearing. However, even if he did make it clear at that stage that he 'knew' the witness, that does not cure what seems to me to have been an error of law in his assessment in this respect.
46. The appellant and his representative were entitled to know what was behind Judge Hembrough's thinking in terms of his familiarity with the witness and what it was about this witness's evidence that cast doubt on his credibility or the weight to be attached to his evidence. This was an issue that ought to have been put to the appellant and his representative for comment to have been made and the opportunity for submissions to have been advanced. Likewise, it seems to me that if Judge Hembrough was to refer to a copy of an earlier decision in which the witness featured, and about which presumably some adverse comment had been made, that document ought to have been made available to the appellant and his representative. It is not clear that it was. I am satisfied that Judge Hembrough erred in law in relation to his assessment of the credibility of that witness in the respects to which I have referred.
47. However, I am not satisfied that it is an error of law that is material. Firstly, what Judge Hembrough said was that Mr Birjandi's evidence was vague in the extreme. Even without any reference to this witness's previous evidence or previous appearance in any other hearing, or the judge's familiarity with the witness, the fact that the evidence was vague was undoubtedly something that would have diminished the weight to be given to that evidence. Secondly, this was but one of a number of witnesses who gave evidence before Judge Hembrough. In various significant respects he found each of the witnesses' evidence to be unworthy of any weight.
48. Thirdly, as is clear from my summary, there were a number of significant features of the appellant's account which undermined his credibility and in

respect of which valid and legally sustainable criticisms were made. In those circumstances, the error of law in relation to the assessment of the evidence of Mr Birjandi is not material. Even without that error of law, the outcome of the appeal would not have been any different.

Decision

49. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, its decision is not set aside and the decision to dismiss the appeal on all grounds is to stand.

Upper Tribunal Judge Kopieczek

dated 10/10/18