



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/02928/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal on 3 May 2017**

**Decision Promulgated
on 16 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jafferji instructed by Birmingham Solicitors
For the Respondent: Mr Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Asjad ('the Judge') promulgated on 18 October 2016 in which the Judge dismissed the appellant's appeal against the rejection of his asylum claim.
2. The Judge notes at [7] that 'what must be decided is whether the appellant is indeed gay or whether he has fabricated his entire claim'.

- The Judge noted what is described as “a vast number of inconsistencies in his evidence all of which went to this core issue”.
3. The Judge sets out findings from [7] to [19] which were challenged by the appellant resulting in a grant of permission to appeal to the Upper Tribunal by another judge of the First-tier Tribunal on the basis that *“permission must be granted because, whilst the FtTJ has marshalled some cogent reasons for disbelieving the appellants core claim to be gay, she has not shown that she has applied the lower standard of proof applicable. The grounds may be argued.”*

Error of law

4. Mr Jafferji referred to the lack of any reference in the decision to the standard of proof, submitting that there was nothing to show that the Judge had applied the correct standard. It was submitted that in the determination the Judge refers to the benefit of the doubt at [14] as well as making reference to the balance of probabilities, both of which it is suggested are the wrong test.
5. I find no arguable legal error in such assertion as it is not necessary for the Judge to set out chapter and verse in relation to the burden and standard of proof which is well known to judges within this jurisdiction and that protection claims are assessed by reference to the ‘lower standard’. A reading of the determination does not make out any specific examples of the Judge applying too high a standard or of making a material misdirection in relating to the standard to be applied when considering those parts of the evidence that were adequately considered.
6. The Judge considered the evidence at [8 - 12] of the decision, referring to a number of alleged inconsistencies in the appellant’s account. These include, for example, evidence regarding the appellant’s feelings for boys when five years of age, a relationship with other named individuals in Pakistan, and alleged inconsistency concerning events at the police station in Pakistan. Mr Jafferji makes the point that all these events occurred some time ago before the appellant left Pakistan and entered the United Kingdom.
7. The appellant’s immigration history shows he was born in Pakistani 1989 where he was educated before attending a polytechnic and obtaining a Diploma in Civil Engineering. He obtained work before attending a university in Islamabad before applying for a student visa to study in the UK in 2011 which was issued, valid from 18 September 2011 to 3 November 2012 to study at the British School of Management Sciences.
8. Even if the events identified by the Judge all took place in Pakistan it was necessary to consider the evidence relating to events that had taken place in the United Kingdom, and assess whether the appellant’s claimed actions in relation to what would amount to sur place activities are credible. It is also arguable that the Judge, having made findings relating to events in Pakistan, transferred those findings regarding the truthfulness or lack of credibility of the appellant’s accounts to the later accounts, which affected consideration of events in the United Kingdom.

9. The appellant mentioned rape which was accepted by the Judge in [13] but in relation to which the Judge found the appellant had been inconsistent about so many things the Judge felt unable to give him the benefit of the doubt even though the appellant claimed he had been referred to the Rape and Sexual Violence Project. The Judge states that the appellant has only done this to bolster his asylum claim and that there was no truth in the events he claims, yet such a conclusion can only be reached once all the evidence has been considered with the required degree of anxious scrutiny. It should not be a case of rejecting evidence from those providing support for an individual asylum seeker based on a pre-conception of the credibility of what is being claimed.
10. There also appears little reference to the cultural context in that the appellant is a Muslim male from Pakistan which could be relevant to his ability to disclose events, in addition to other reasons why a victim of rape may not wish to openly discuss what had occurred to them.
11. At [14] the Judge refers to a letter from Birmingham LGBT confirming the appellant attended a group session from September 2015 only, which the Judge states "coinciding with the time the Appellant put in this asylum claim. There is nothing to say that he was attending any such group since his arrival in the UK in 2011 or that he accessed any kind of help from potentially traumatic experiences that would have been very fresh in his mind". The Judge also finds "Indeed, it is only after the Appellant has put in his asylum claim that the experiences have surfaced and he has asked for help. The LGBT note in their letter that the Appellant attended a one-off support session with Anna Rowbottom in September 2015".
12. The issue that arises from the Judge finding that the timing of the appellant's involvement with Birmingham LGBT was found to be opportunistic is that there is no specific mention or analysis of the appellant's evidence in his witness statement that he approached LGBT prior to claiming asylum and it was because of his approach to this organisation that he claimed asylum. A letter from LGBT dated 16 October 2015 details exactly what happened and the relevant chronology, which was a document available to the Judge at page 126 of the appellant's appeal bundle.
13. On 20 April 2016, a second letter was written, the second paragraph of which confirms the appellant contacted LGBT in September 2015 and visited them on the 25 September 2015 and that they informed him that the asylum process existed and referred him. This letter is, again, available to the Judge at page 128 of the appellant's appeal bundle. There is no reference to either these items of correspondence or their related content by the Judge in [14] of the decision.
14. Similarly, at [15] the Judge mentions a letter from the appellant's GP which it is claimed demonstrates that the first time the appellant was seen by the GP was after his asylum claim was refused and that the GP can only comment upon what the appellant reported in relation to feelings. The Judge noted the GP prescribed medication and referred the appellant to a psychiatrist and that the appellant had self-inflicted lacerations to his wrists, but claims there was nothing to say how serious the injury was. The Judge refers to a report from a Mr Mason

- which is commented upon below. The Judge felt it important the GP made no mention of the appellant having disclosed rapes that occurred in Pakistan nor did he request that any STD tests be carried out for HIV or AIDS. What is of more concern is the specific comment recorded by the Judge towards the end of that paragraph of "Given the credibility findings that I have made and the timing (and lack) of these disclosures I find that I can place only limited weight on the medical evidence as being supportive of the Appellants claims." The reason that statement is of concern is that it is suggestive of an artificial separation in the mind of the Judge of the assessment of the credibility of the account and the medical evidence. A decision on the former has been used to support a finding that little weight should be attached to the latter, when the obligation upon the Judge was to consider all the evidence together in the round, including the medical evidence, before assessing the credibility of the claim.
15. The letter from the GP does not only record what the appellant reported by way of symptoms, although it is unclear how the Judge thinks the GP would know how the appellant was feeling other than to ask him and to record the answers. The GP would no doubt have asked the appellant about how he was feeling and what the problem was and has recorded within the letter the response given. The letter from the GP also contains much more. It is dated 28 July 2016 and sets out in considerable detail the GP's observations which are not based solely upon what the appellant has said. The letter also sets out the extent of further enquiries and is not, arguably, no more than a self-reporting diagnosis. There is arguable merit in the assertion that the appellant has failed to give proper or adequate consideration to the medical evidence.
 16. The Judge also appears to attach significance to the lack of any STD tests but fails to explain how that is relevant to assessing the core issue in the claim. The importance of the fact the appellant may not have disclosed the rape to the GP and no tests may have been undertaken to the issue of the appellant's sexuality is not adequately explained.
 17. The report of Mr Mason is a scarring report which the Judge mentions at both [15] and [16]. Mr Mason refers to the Istanbul Protocol and uses appropriate terminology when assessing the issue of causation. The Judge concludes at [16] that, notwithstanding Mr Mason confirming that the injuries are consistent with the explanation as to causation, they could have resulted from any argument and not necessarily from an incident arising from his sexuality. Mr Jafferji submits the Judges consideration of the report from Mr Mason is "poor" and submits the Judge has not engaged with the evidence and scarring on the wrist, which are said to be self-inflicted injuries by a person who is said to have mental health issues and to be suicidal, and which form part of the overall picture presented to the Judge. The submission has arguable merit.
 18. At [17] the Judge deals with the witness evidence including that from Mr IT. The Judge describes IT within the group of those described as "friends who are gay" but states that it is not accepted that the appellant is himself gay or in a relationship with IT as he has been

shown to have given inconsistent evidence on almost every aspect of his claim and demonstrated he is not a credible or reliable witness. To the extent there is artificial separation in the assessment of the evidence legal error is made out. The rejection of the evidence of IT in the manner set out in the determination does not indicate a proper assessment of the evidence, suggestive of a conclusion without adequate reasoning. The evidence referred to in this paragraph is also not the only source of evidence as there are several letters at pages 130, 132, 149 and 153 of the appellant's appeal bundle, amongst others, which do not appear to have been adequately considered.

19. The appellant refers to difficulties he experienced in self-expressing because of cultural aspects in the witness statement of 9 August 2016. As stated, the LGBT letter shows the appellant joined the organisation before claiming asylum contrary to the Judges specific finding on this point.
20. Even if the Judge is correct in relation to the assessment of events in Pakistan this does not detract from the obligation to properly assess the evidence of events in the United Kingdom. Had this occurred the Judge may have been entitled to come to the same conclusion but until there has been a proper and adequate examination of the evidence relating to UK based activities and relevant evidence it cannot be said that that will be the likely outcome.
21. At [17] the comment by the Judge that the appellant gives inconsistent evidence for all aspects of the claim cannot stand as the Judge only appears to have examined events relating to Pakistan. The assessment of the core issue identified in HJ(Iran) can only be determined with a proper and adequate examination of all the evidence. The submission by Mr Jafferji that there are no inconsistencies in relation to IT, no inconsistencies regarding LGBT, no inconsistencies in relation to the appellant's mental health problems, and no recorded inconsistencies in relation to the appellant's evidence regarding events in the United Kingdom where he has lived for a period of five years, requires proper and detailed examination and for appropriate findings to be made.
22. I find that for the above reasons the determination cannot be maintained and must be set aside. As there has been a failure by the Judge to adequately assess the evidence made available to the First-tier Tribunal and further detailed factual findings are required, this is a matter in which the Upper Tribunal has no option other than to remit the matter to the First-tier Tribunal for it to be heard afresh by a judge other than Judge Asjad.
23. As the matter is being remitted no specific direction is made in relation to preserved findings although both parties accept that the inconsistencies noted by the Judge in relation to the evidence of events in Pakistan are matters of record that may well form the starting point for any further assessment of the evidence, the focus of which is more likely than not to be in relation to events in the UK and the evidence provided in support of the appellants claim.
24. The test set out by the Supreme Court in HJ (Iran) of:

(i) Is the applicant gay, or someone who would be treated as gay by potential persecutors in his country of origin? If no, the claim should be refused. If yes:

(ii) Do openly gay people have a well-founded fear of persecution in the country of origin? If no, the claim should be refused. If yes:

(iii) In respect of his sexual orientation, on his return, will the applicant be open? If yes, he is a refugee and his claim should be allowed. If no:

(iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.

has been held to still represent good law in *LC (Albania) v SSHD [2017] EWCA Civ 351*, and is to be followed.

Decision

25. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to be reheard by the First-tier Tribunal sitting at Birmingham by a judge other than Judge Asjad, on a date to be fixed per the operational requirements of the Hearing Centre and availability of Mr Jafferji.**

Anonymity.

26. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 1⁶th of May 2017