Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00200/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 12 August 2015

Decision & Reasons Promulgated
On 17 August 2015

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

OD
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Smith (Counsel)
For the Respondent: Mr McVeety (Home Office Presenting Officer)

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The appellant is a citizen of Nigeria. I have anonymised this decision as it refers to sensitive matters concerning the appellant's sexuality and mental health.

Procedural history

2. The appellant appealed to the First-tier Tribunal against a decision to make a deportation order against him, which was served on 16 January 2014. In a decision promulgated on 16 June 2014 a panel of the First-tier Tribunal dismissed the appellant's appeal, having found the appellant not to be a credible witness and having concluded that Dr Winton's psychiatric report dated 25 May 2014 was unreliable.

3. In grounds of appeal dated 25 June 2014 Counsel who appeared before the panel set out four grounds of appeal. Ground 1 states that the panel made four factual errors in its decision and these amount to errors of law. This was accompanied by a witness statement from the appellant's solicitor, Ms Brown and an email from Dr Winton. Ground 2 submits that the panel erred in law in stating that any Article 8 analysis is completed solely by reference to the Immigration Rules. Ground 3 argues that the panel reached an irrational conclusion that alternative medication is available to the appellant in Nigeria. Ground 4 submits that the panel wrongly expected Dr Winton to comment upon the availability of healthcare provision In Nigeria when this is outside his expertise.

4. Permission to appeal was initially refused by the First-tier Tribunal on 7 July 2014 but granted by Upper Tribunal Judge Warr on 8 September 2014.

5. The matter now comes before me to determine whether or not the decision contains a material error of law.

Hearing

6. The appellant did not appear at the hearing. Ms Smith explained that his mental health had deteriorated and he had recently been detained at HMP Nottingham. Ms Smith was content for the hearing to proceed but only to determine whether or not the panel had made an error of law. Mr McVeety did not object to this.

7. During the course of her helpful oral submissions Ms Smith relied upon the four grounds of appeal prepared by Counsel who represented the appellant before the First-tier Tribunal, save for ground 2, which she accepted was difficult to follow. Mr McVeety responded to each ground of appeal in turn. I refer to the parties' submissions in more detail when I address each ground below.

8. After hearing submissions I reserved my decision, which I now provide with reasons.

Error of law discussion

9. I observed at the hearing and both representatives agreed that the decision of the panel is not a clearly written one. There are no sub-headings and there is no clear structure to the decision. There is no clear direction that the relevant legal framework is set out entirely within the Rules (398 and 399) and that these are a complete code. The recitation of what was said during the course of the evidence is difficult to follow. However both representatives agreed that the question for me is whether or not the decision contains a material error of law and that I should assess this by reference to the grounds of appeal relied upon on behalf of the appellant. I now consider each ground of appeal in turn.

Ground 1

10. Ground 1 submits that the panel made mistakes of fact that caused unfairness and as such erred in law in four discrete ways divided (a) to (d), which I address in turn below.

11. I first deal with the fresh evidence relied upon which was not before the panel - the statement of Ms Brown and the email from Dr Winton. Mr McVeety argued that this evidence was a belated attempt to explain matters, which could and should have been explained to the panel and should not be admitted. Ms Smith relied upon in E & R [2004] EWCA Civ 49 which has of course been applied in R (Iran) v SSHD [2005] EWCA Civ 982 and reminded me that the appellant maintains he is at risk of serious harm in Nigeria and as such I should apply a flexible approach to fresh evidence. It is clear from [66] of E & R that for a mistake of fact giving rise to unfairness to be a head of challenge in an appeal on a point of law, there must first have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; secondly the fact or evidence must have been "established" in the sense that it was uncontentious and objectively verifiable, and, thirdly, the appellant or his advisors must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

12. In order to establish a mistake of fact, it is often necessary to admit fresh evidence, as in this case. The principles upon which fresh evidence may be admitted in appeals restricted to establishing an error of law were considered authoritatively by the Court of Appeal in Ladd v Marshall [1954] 1 WLR 1489. It is now accepted that these must be applied flexibility in public law cases and particularly asylum cases, where anxious scrutiny is required. However as Jackson LJ observed in JG (Jamaica) v SSHD [2015] EWCA Civ 215 at [9]:

> "Nevertheless the fact remains, as Mr Gill points out, that the Ladd v Marshall principles are still relevant, although the court applies them more flexibly. There must be a limit to that flexibility."

13. Unfortunately the appellant's solicitors have not complied with rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and paragraph 4.2 of the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal. I have still nonetheless considered whether the fresh evidence should be admitted. In my view the evidence explaining delay (para 3 of the statement) could and should have been before the panel. There was an obvious and lengthy delay in the appellant telling the SSHD about his claimed bisexuality yet this was not fully explained. This is obvious evidence that was easily available and could have been obtained with reasonable diligence. The fact that Dr Winton was not instructed to address the appellant's bisexuality at all but had access to the relevant materials is clear from his report (para 2 of statement). I do not consider that the remainder of the statement and Dr Winton's email contains material that would have an important influence on the result of the case for reasons I set out in more detail below.

14. In case I am wrong about not admitting the fresh evidence I have gone on to determine whether or not that evidence in any event establishes mistakes of fact causing unfairness.

15. Turning to (a) first. The panel was entitled to express its concern that the instructions to Dr Winton did not include the appellant's claim to be bisexual and the fact that he was opposed to members of his close family finding out about this because of their religious and cultural beliefs [39]. This must be seen in context. Whilst a person's sexuality may not always be relevant to an assessment of risk of deterioration in mental health if removed to another country, this appellant was very concerned to ensure that his family members in the UK did not find out about his claimed bisexuality such that the public were excluded from the hearing [11] and the witnesses gave evidence without knowing about this aspect of his claim. The appellant's reasons for not telling his family members about his sexuality are set out in some detail in his witness statement. The panel merely observed that it is surprising that the instructions did not highlight the appellant's concerns on the basis that they might be relevant to his perception of risk and his prognosis when in Nigeria. The grounds of appeal assert that the panel was wrong to state that the appellant's solicitors failed to mention his claim to be bisexual to Dr Winton and refer to [39] in this regard. The panel did not state this. The panel simply observed there is no reference to the appellant's bisexuality in the report and went on to state there were no express instructions on the role his bisexuality and his claimed difficulty in being open about it might have on his prognosis. These are not errors of fact.

16. I now turn to (b). The panel was entitled to express its concern that either no steps were taken to seek evidence from those who knew about the appellant's homosexual relationship "*or to explain why such evidence was not available*" [41] Even if steps had been taken

(as set out in Ms Brown's statement) it is not disputed that no explanation was given for the absence of such evidence until the appellant was cross-examined [14]. Any mistake of fact regarding the absence of steps taken is therefore not material and did not cause unfairness because the panel made it plain that even if steps were taken these were not explained.

17. It is submitted at (c) that it was a mistake for the panel to state "*that the appellant had not actually told his solicitors about those who knew of his bisexuality when the appeal was being prepared*". This is said to be based upon [42]. This is a very difficult paragraph to follow and is not clearly expressed. The panel here appear to express its concern about the delay in the appellant's claim to be bisexual being put to the SSHD. It is not disputed that when the appellant completed his screening questionnaire in April 2012 he did not refer to this being an issue. The appellant explained at the hearing that he told his solicitor about his sexuality after this in 2012. Yet neither the appellant nor his solicitors sought to clarify or update the information contained in the questionnaire until January 2014 when grounds of appeal were lodged in relation to the deportation decision. On the material available to the panel, it was entitled to be concerned about this delay. Ms Smith argued that any blame lies with the solicitors and not the appellant. I do not accept that the panel was not entitled to draw adverse inferences from the appellant's failure to ensure that his full claim was available to the SSHD at an early stage.

18. At (d) the grounds criticise the panel's "*assertion that Dr Winton had not received the letter of 13 June 2013*". The reference provided for this in the panel's decision is [57]. This criticism is difficult to follow. The point being made by the panel at [50] to [57] is that Dr Winton's summary of the 13 June 2013 letter at 4.3.1 is not an accurate one [51-52]. The panel therefore concluded that either Dr Winton did not receive the correct letter or that he has misinterpreted its contents [53]. In these circumstances I can detect no mistake of fact causing the appellant unfairness regarding the panel's findings in this regard.

19. Before leaving ground 1 it is important to observe that even if the panel, contrary to my conclusions, made an error of law in not accepting the appellant's claim to be bisexual, it is very difficult to see how this is a material error, in so far as Article 3 of the ECHR and asylum is concerned. It is now well established following HJ (Iran) [2010] UKSC 13 that if it is accepted that a gay person will be returned to a country where people who live openly are subject to persecution, the Tribunal must go on to determine what the individual would do. If the individual would in fact live discreetly and so avoid persecution, then it must be asked *why* he would do so. HJ (Iran) then said this [82]

> "If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents

> or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted."

20. It is clear from the appellant's evidence in this case that he lives discreetly in the UK. He has not disclosed his sexuality to his mother and sister or close friends. His statement explains that they will not understand. He maintained that position at the hearing and made it clear that he was not ready to be open about his sexuality either in the UK or Nigeria [15]. This seems to be a case in which the appellant would choose to live discreetly in Nigeria as he does in the UK, simply because that is how he himself wishes to live, or because of social pressures, such as not wanting to distress his family members or embarrass his friends.

Ground 2

21. Ms Smith did not rely upon this ground. She was right to do so. It is very difficult to follow. It is now and was at the time of the hearing accepted that the Immigration Rules are a complete code in deportation cases. This has been recently explained in Bossade (ss117A-D - interrelationship with Rules) [2015] UKUT 415 (IAC):

> "31. The existing case law makes very clear that in foreign national deportation cases, the two-stage approach must be conducted entirely within the Rules because they are a "complete code" for these purposes (MF (Nigeria) [2013] EWCA Civ 1192 at [16]); the same is not necessarily true for other types of cases where there may be gaps. In Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636, Sales LJ stated at [39]:
>
> > "The fact that the new rules [on foreign criminals] are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v*

Secretary of State for the Home Department [2013] EWHC 720 (Admin)."

32. In SS (Congo) Sales LJ at [45] put matters this way:

"The latter stage of the [two-stage analysis] analysis will be covered by the text of the Rules themselves, as in relation to the Rules covering deportation of foreign criminals reviewed in MF (Nigeria). Those Rules laid down substantive conditions which, if satisfied, would lead to the grant of LTR, but also stated that LTR might be granted in "exceptional circumstances" if the substantive conditions were not satisfied in a particular case. Where the Rules take this form, it can be said that they form a "complete code", in the sense that both stages of the analysis are covered by the text of the Rules. But this does not take one very far, since under the "exceptional circumstances" rubric one still has to allow for consideration of any matters bearing on the application of Article 8 for the purposes of the second stage of the analysis: see AJ (Angola), above, at [46] and [55]. This is the basic point made by this court at paragraph. [44] - [46] of its judgment in MF (Nigeria)."

33. We have seen cases in which tribunal judges have regarded Part 5A considerations as provisions that have to be directly applied and without qualification when deciding cases under the Immigration Rules. We respectfully suggest that such an approach cannot be correct for a number of reasons."

22. Whilst the panel did not properly direct itself to paragraph 398 of the Immigration Rules and instead conducted a full Article 8 assessment, this is not a material error of law on the panel's findings.

Ground 3

23. This ground submits that the panel's conclusion that alternative medication would be available [61] and [74] in Nigeria is without any evidential basis and irrational. One of the difficulties with this submission is that Dr Winton himself understood that there are other injectable medications in Nigeria at 8.3.2 and "it is possible that one of them would work to the extent of suppressing his symptoms although it would be unlikely to lead to full control. In conclusion if he were to be placed on a different depot medication it is possible that it might prove as effective as Paliperidone but there is no guarantee". Of course Dr Winton had acknowledged at 8.3.1 that Paliperidone had only suppressed his symptoms by about 50%.

24. The panel did not accept that there was sufficient evidence that Resperidone remained ineffective for the appellant [59]. The panel accepted that there was evidence from 2012 that it was unsuitable at that time but concluded that the analysis has not been updated in evidence upon which it was prepared to place reliance. Whilst the panel did not accept the reliability of Dr Winton's report, Dr Winton's evidence was not that Respiridone was not suitable for him at present but that if he is given tablets his psychosis would be more difficult to

control. It was submitted that absent the support of family he would not be sufficiently prompted to take his medication. This was based upon the appellant's case that he did not have supportive family in Nigeria. The panel of course rejected the evidence of the appellant, his sister and mother to that effect [68-74].

25. When the decision is read as a whole it is clear that the panel did not consider that the appellant displaced the burden upon him to establish that alternative medication was not available.

Ground 4

26. At [48] the panel merely observed that it would have been more helpful for Dr Winton to have been appraised of the relevant services available in Nigeria to treat the appellant. The panel was entitled to make this observation – it would have been entirely within Dr Winton's expertise for him to assess the appellant's likely response to the mental health services and medication available in Nigeria. Indeed Dr Winton plainly regarded the availability of medication to be relevant to his assessment and conducted research himself (as his email makes clear).

27. It follows that I do not find that the appellant has established that the panel made an error of law. Whilst there are unsatisfactory aspects to the decision and it might be described as harsh in its findings and treatment of Dr Winton's report, it does not contain any material error of law.

Decision

28. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and I do not set aside the decision.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
13 August 2015